84-1288

No. .....

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In The

Supreme Court of the United States

October Term, 1984

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK, and WILLIAM GRUZINSKI,

Petitioners,

vs.

JEFF D., PAULA E., JOHN M. and DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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57

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in holding it unethical for defendants in a civil rights class action to negotiate simultaneously a settlement on the merits with attorney's fees and costs.

2. Whether the court of appeals erred in failing to recognize the inherent and statutory power of district courts to prescribe ethical standards for attorneys appearing before them.

3. Whether, without finding an abuse of discretion, the court of appeals erred in reversing the district court's denial of attorney's fees under 42 U.S.C.A. §1988.

4. Whether the court of appeals has jurisdiction to vacate a post-judgment discovery order not appealed and not "fairly comprised" within the appealed order.

LIST OF PARTIES

Petitioner John V. Evans was sued in his official capacity as Governor and chief executive officer of the State of Idaho. Petitioner Rose Bowman is the successor in office to Milton G. Klein, sued in his official capacity as Director of the Idaho Department of Health and Welfare. Petitioner George Bachik was sued in his official capacity as Administrative director of State Hospital South, an administrative unit of the Department of Health and Welfare. Petitioner William Gruzinski is the successor in office to Carroll Elmore, sued in his official capacity as Clinical Director of State Hospital South. Although included in the caption before the Court of Appeals, Defendant Jerry Evans, State Superintendent of Public Instruction, was not a party to the orders appealed and is not a petitioner herein.

Respondents, Jeff D., Paula E., John M. and Dusty R., sued individually and on behalf of children who, because of mental illness, have been admitted to treatment facilities of the State of Idaho. As minors, suit is brought on their behalf by their next friend, Charles Johnson, III, who was also their counsel of record before the District Court and Court of Appeals.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Authorities	iv
Reference to Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	
1. In the District Court	4
2. In the Court of Appeals	6
Jurisdiction of the District Court	8
Reasons for Granting the Writ	
1. The Decision Below Conflicts With Applicable Decisions of this Court	8
2. The Decision Below Conflicts With Another Decision of a Court of Appeals	11
3. The Decision Below Raises Important Questions of Federal Law Which Have Not Been But Should Be Decided by this Court	14
4. The Decision Below Departs from the Accepted and Usual Course of Judicial Proceedings Calling for an Exercise of this Court's Supervisory Power	20
Conclusion	21
APPENDIX	
1. Stipulation Settling Mental Health Claims and Order	1a
2. Order Denying All Costs	11a
3. Notice of Appeal	13a
4. Order Suspending Performance Pending Appeal	15a
5. Opinion of the Court of Appeals	17a
6. Order Enlarging Time to Respond to Discovery	26a
7. Order Granting Second Emergency Motion For Stay	28a
8. Order Denying Petition for Rehearing	29a
9. Order Denying Second Petition for Rehearing	30a

TABLE OF AUTHORITIES

Page

CASES:

Airline Stewards and Stewardesses Ass'n. Local 550 v. American Airlines, 573 F.2d 960 (7th Cir. 1978), cert. den., 439 U.S. 876 19

Boykin v. Alabama, 395 U.S. 238 (1969) 11

Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) 13, 16, 18

Brown v. General Motors Corp. Chevrolet Division, 722 F.2d 1009 (2d Cir. 1983) 14

Carson v. American Brands, Inc., 450 U.S. 79 (1981) 8, 9

Chicano Police Officer's Association v. Stover, 624 F.2d 127 (10th Cir. 1980) 9, 12

Grunin v. International House of Pancakes, 513 F. 2d 114 (8th Cir. 1975) 11

Halliday v. Stuart, 151 U.S. 229 (1893) 11

Hensley v. Eckerhart, — U.S. —, 76 L.Ed.2d 40 (1983) 7, 10

Holker v. Parker, 11 U.S. (7 Cranch) 436 (1813) 10

Jennings v. Metropolitan Gov. of Nashville, 715 F.2d 1111 (6th Cir. 1983) 12

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 9

Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. den. 401 U.S. 912 18

Osborn v. Bank of the United States, 23 U.S. (9 Wheat.) 738 (1824) 10

Pennhurst v. Halderman, — U.S. —, 79 L.Ed.2d 67 (1984) 8

Polk County v. Dodson, 454 U.S. 312 (1981) 15

TABLE OF AUTHORITIES—Continued

Page

Rogers v. The Marshall, 68 U.S. (1 Wall.) 644 (1863) 10

Stowe v. United States, 86 U.S. (19 Wall.) 13 (1873) 10

Theard v. United States, 354 U.S. 278 (1956) 15

White v. New Hampshire Department of Employment Security, 629 F.2d 697 (1st Cir. 1980) 11

White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982) 9, 14

Young v. Powell, 729 F.2d 563 (8th Cir. 1984) 12

COURT RULES:

Federal Rules of Civil Procedure

Rule 6(b) 3, 20

Rule 23 21

Rule 23(b)(2) 18

Rule 23(e) 3, 6, 18

Federal Rules of Appellate Procedure

Rule 3(c) 3

Rule 8(a) 3

Local Rules of Practice for the United States District Court for the District of Idaho

Rule 2-107 4

Rule 2-109 4

STATUTES:

20 U.S.C.A. 1401, *et seq.* 5

28 U.S.C.A. 1254(1) 1

28 U.S.C.A. 1291 2

28 U.S.C.A. 1292(a) 2

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C.A. 1292(b)	2
28 U.S.C.A. 1331	4, 8
28 U.S.C.A. 1343	4, 8
28 U.S.C.A. 1651	1
28 U.S.C.A. 1654	1, 7, 9, 16
29 U.S.C.A. 794	5
42 U.S.C.A. 1981	12, 17
42 U.S.C.A. 1982	17
42 U.S.C.A. 1983	5, 17
42 U.S.C.A. 1985	17
42 U.S.C.A. 1986	17
42 U.S.C.A. 1988	1, 5, 6, 7, 9, 12, 13, 16, 17, 21
42 U.S.C.A. 6020, *et seq.*	5
39-4600, *et seq.*, Idaho Code	5

TREATISES:

68 A.B.A. Journal 23 (1982)	19
Manual for Complex Litigation (1981)	18
American Bar Association, *Model Code of Responsibility* (1981)	15
American Bar Association, *Model Rules of Professional Conduct* (1983)	15, 18

REFERENCE TO OPINIONS BELOW

The Opinion of the Court of Appeals vacating the District Court's denial of attorney's fees and costs is reported at 743 F.2d 648 (9th Cir. 1984). A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on November 21, 1984. The Order of the District Court enlarging time to respond to discovery was vacated on November 6, 1984. A timely Second Petition for Rehearing and Suggestion for Rehearing *En Banc* regarding the discovery order was denied on December 6, 1984. All unpublished orders appear in the Appendix.

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JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. §§1254(1) and 1651.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C.A. §1654 (1949):

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cases therein."

42 U.S.C.A. §1988 (1982):

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the

Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

28 U.S.C.A. §1291 (1982):

"The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

28 U.S.C.A. §1292(a) (1982):

"The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

28 U.S.C.A. §1292(b) (1958):

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." Emphasis in original.

Rule 6(b), Federal Rules of Civil Procedure:

> "Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them."

Rule 23(e), Federal Rules of Civil Procedure:

> "Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Rule 3(c), Federal Rules of Appellate Procedure:

> "Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken."

Rule 8(a), Federal Rules of Appellate Procedure:

> "Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals. Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of

> appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action."

Rule 2-107, Local Rules of Practice for the United States District Court for the District of Idaho:

> "An attorney of record may bind his client in any steps of an action or proceeding, by a stipulation in writing filed with the Clerk, or by stipulation made in open court and entered upon the minutes of the court, and not otherwise."

Rule 2-109, Local Rules of Practice for the United States District Court for the District of Idaho:

> "The members of the bar of this Court shall adhere to the American Bar Association's Code of Professional Responsibility and the Code of Professional Ethics promulgated by the Supreme Court of the State of Idaho."

STATEMENT OF THE CASE

1. In the District Court.

This civil rights class action sought declaratory and injunctive relief on behalf of children who, because of mental illness, have been committed to Petitioner Bowman, Director of the Idaho Department of Health and Welfare. Invoking the District Court's jurisdiction pursuant to 28 U.S.C.A. §§1331 and 1343 and the doctrine of pendent jurisdiction, and stating claims under 42 U.S.C.A. §1983, Respondents sought an injunction prohibiting their admis-

sion to State Hospital South, a psychiatric hospital administered by Petitioners Bowman, Bachik and Gruzinski, the establishment of community based residential facilities for the provision of additional mental health services, and costs and attorney's fees pursuant to 42 U.S.C.A. §1988. The action also sought the provision of educational services resulting in a separate educational settlement with Defendant Jerry Evans which was not appealed and thus is not a part of this Petition. The education settlement contained a waiver of costs and attorney's fees such as that contained herein; as did the initial discussion drafts of the settlement herein prepared by Respondents.

Respondents claimed violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States of America, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. §794, the Education for All Handicapped Children Act of 1975, 20 U.S.C.A. §1401, *et seq.;* the Developmental Disabilities and Bill of Rights Act, 42 U.S.C.A. §6020, *et seq.;* and certain Idaho constitutional and statutory provisions. The District Court granted partial summary judgment in favor of Petitioners as to all claims except those arising under the federal constitution and §§39-4600, *et seq.*, Idaho Code.

In September, 1982, the District Court certified the proceeding as a class action with respect to the mental health claims. The parties then engaged in settlement negotiations. Petitioners conditioned negotiations on the waiver of costs and attorney's fees. Counsel for Respondents asserted it was unethical to so negotiate. However, the parties agreed to submit the ethics question to the District Court for resolution, negotiated a settlement with a provision that both Respondents and Petitioners waived

"costs and attorney's fees thus far incurred, if so approved by the Court" and further stipulated that the settlement was to be tendered to the District Court for approval only if it concluded the practice was ethical.

On April 28, 1983, the District Court found the practice, ethical, and pursuant to Rule 23(e), F.R.C.P., approved the settlement. Respondents moved for costs, including attorney's fees. On May 6, 1983, the District Court denied the motion based, inter alia, upon the approved settlement and the prior proceedings in the case. Respondents then appealed the Order Denying All Costs of May 6, 1983.

While the matter was pending in the Court of Appeals, Respondents propounded certain interrogatories, requests for production and requests for admission. On October 22, 1984, the District Court granted Petitioners' Motion For Enlargement of Time to delay responding to the discovery while this matter was on appeal.

2. In the Court of Appeals.

The Court of Appeals framed the question to be decided:

> The question here is whether the court, in reviewing a class action settlement in a civil rights action, properly approved the waiver of attorneys' fees simply because it was a part of the settlement to which the parties had agreed. *Jeff v. Evans,* 743 F.2d 648, 650 (9th Cir. 1984).

Without any factual basis in the record on appeal, the Court of Appeals found that Respondents were "prevailing parties" and entitled to an award of attorney's fees under 42 U.S.C.A. § 1988. 743 F.2d at 650. The Court of

Appeals, relying on the legislative history of 42 U.S.C.A. § 1988 and this Court's opinion in *Hensley v. Eckerhart*, — U.S. —, 76 L.Ed.2d 40 (1938) reasoned that the District Court was "obliged" to award attorney's fees. 743 F.2d at 651.

The Court of Appeals did not address whether the right to request attorney's fees and costs could be waived. Nor did it attempt to balance the congressional authorization of 28 U.S.C.A. § 1654 for District Courts to supervise the practice of attorneys admitted to practice before them with the 42 U.S.C.A. § 1988 incentive for civil rights actions in the form of awarding attorney's fees.

The Court of Appeals then "reversed and remanded for determination of reasonable attorney's fees." 743 F.2d at 652. It did not find that the District Court abused its discretion in denying the request for attorney's fees. Nor did it find that the District Court abused its discretion in approving the settlement. Rather, it voided the provision of the settlement waiving the right to claim fees, left the remainder of the settlement intact, and prohibited the District Court from exercising its discretion to determine whether Respondents are entitled to a reasonable attorney's fee.

While the main action was pending, Respondents submitted a Second Emergency Motion for Stay Pending Appeal to the Court of Appeals pursuant to Rule 8(a), Federal Rules of Appellate Procedure. Respondents did not appeal the Order Enlarging Time which was the subject of the Second Emergency Motion. Without discussion of whether the Second Emergency Motion was "fairly comprised" within or collateral to the appealed order, and without an appellate record, briefs and argument, the Court of Appeals "vacated" the Order Enlarging Time.

JURISDICTION OF THE DISTRICT COURT

The District Court's jurisdiction was invoked pursuant to 28 U.S.C.A. §§ 1331 and 1343. Jurisdiction over the federal constitutional and statutory claims is not contested. However, upon remand, Petitioners will contest jurisdiction over the state constitutional and statutory claims under the doctrine of *Pennhurst v. Halderman*, — U.S. —, 79 L.Ed.2d 67 (1984).

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REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with applicable decisions of this Court.

Although this Court has not yet decided the question whether parties in a civil rights action may simultaneously negotiate a settlement on the merits with the issue of attorney's fees and costs, recent decisions of this Court have recognized (1) the right of the parties to settle civil rights class actions on mutually agreeable terms; (2) the power of district courts to resolve ethical issues involved in the simultaneous negotiation of fees with the merits of an action; and (3) the power of district courts to deny attorney's fees in appropriate circumstances.

In *Carson v. American Brands*, 450 U.S. 79 (1981), an employment discrimination class action, this Court recognized that the parties have the "right to compromise their dispute on mutually agreeable terms." 450 U.S. at 88. In the present action, two stipulations involved. In the first, the parties conditionally tendered the negotiated settlement to the District Court for review and approval only if it found the waiver for fees ethically acceptable. In the second, they agreed to settle the case on various terms, one of which was the waiver of attorney's fees and costs. The decision of the Court of Appeals would force the parties to settle on terms to which Petitioners had not

agreed and ignores their first stipulation in which the settlement was conditionally tendered for approval. Further, the *Carson* opinion expressly recognizes:

> Settlement agreements may thus be predicated on an express or miplied condition that the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation. 450 U.S. at 87.

This Court has declined adoption of a *per se* rule prohibiting the simultaneous negotiation of attorney's fees with the merits of the action. Rather, this Court suggested a case-by-case resolution of the issue. In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), this Court recognized that the discretion afforded district courts by 42 U.S.C.A. § 1988 would "support a denial of fees in cases in which a post-judgment motion unfairly surprises or prejudices the affected party." 455 U.S. at 454. Petitioners urge that the present case is squarely within the scope of *White*. The District Court denied fees based upon the previous stipulation which it had approved. The decision of the Court of Appeals would reform the settlement agreement and eliminate Respondent's only substantive promise. Thus, the only way to avoid "unfair surprise and prejudice" would be to vacate the Court of Appeals' decision and either affirm the District Court's decision or allow the parties to return to the bargaining table. This result is consistent with 28 U.S.C.A. § 1654 authorizing District Courts to proscribe standards of professional practice for attorneys appearing before them.

Similarly, in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), this Court recognized that there is no right to attorney's fees if an award would be "unjust." One lower court has suggested it would be "unjust" to award attorney's fees if the claimant misled the other party. *Chicano Police Officer's Association v.*

Stover, 624 F.2d 127 (10th Cir. 1980). A similar circumstance is present in this case: Petitioners negotiated and settled the case with the expectation that Respondents would not ask for attorney's fees. The Court of Appeals would force a settlement to which the parties have not agreed.

In *Hensley v. Eckerhart,* — U.S. —, 76 L.Ed.2d 40 (1983), this Court ruled that district courts have discretion to award attorney's fees under 42 U.S.C.A. § 1988. Indeed the statute expressly so provides. However, the Court of Appeals did not remand the matter for a determination of whether Respondents are prevailing parties or otherwise entitled to fees (Petitioners vigorously assert, under the particular circumstances of this case, that they are not but would be denied the opportunity to present their position to the District Court) and, if so, the amount of a reasonable fee. Rather, the Court of Appeals remanded the action "for determination of reasonable attorney's fees." 743 F.2d at 652. The Court of Appeals did not conclude that the District Court abused its discretion; rather, it would afford the District Court no discretion in the matter.

This Court has long recognized the authority of an attorney at law to act on behalf of a party, even without the express consent of the party, and thereby protected opposing parties dealing with the attorney at law. *Holker v. Parker,* 11 U.S. (7 Cranch) 436 (1813) (Unauthorized submission to arbitration enforced); *Stowe v. United States,* 86 U.S. (19 Wall.) 13 (1873) (Party estopped to deny court approved settlement); *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824) (Corporation bound by acts of attorneys); *Rogers v. The Marshall,*

68 U.S. (1 Wall.) 644 (1863) (Client bound by instructions of attorney to third person); *Halliday v. Stuart*, 151 U.S. 229 (1893) (Third party may rely on attorney's settlement). However, implicit in the Court of Appeals' decision is the conclusion that an attorney's waiver of fees, even in a case where the attorney is legally authorized to consent for the client, is ineffective.

This Court allows parties to waive fundamental constitutional rights, such as the rights to counsel, jury trials and confrontation. *Boykin v. Alabama*, 395 U.S. 238 (1969). However, the decision below refuses to allow an attorney and next friend to waive the statutory right to request attorney's fees. Thus, the Court of Appeals would allow civil rights plaintiffs to invite defendants to the bargaining table with the hope of waiving fees and even with a promise to waive fees in return for settlement and then allow the one substantive provision of value to the defendants to be excised, while leaving the remainder of the "agreement" intact.

2. The decision below conflicts with the decision of other courts of appeals.

The Courts of Appeal for the First and Eighth Circuits have approved the simultaneous negotiation of the merits and fees. *Grunin v. International House of Pancakes*, 513 F.2d 114, 125 (8th Cir. 1975) cert. den. 423 U.S. 864; *White v. New Hampshire Department of Employment Security*, 629 F.2d 697, 705 (1st Cir. 1980) (rev'd on other grounds 455 U.S. 445). Similarly, the Sixth, Eighth and Tenth Circuits would allow civil rights plaintiffs to waive the claim for attorney's fees. The decision of the United States Court of Appeals for the Ninth Circuit conflicts with the decisions of these circuits.

In *Young v. Powell*, 729 F.23d 563 (8th Cir. 1984), the parties entered into a settlement of an employment discrimination class action resulting in the action's dismissal with prejudice. Thereafter plaintiffs moved for fees under 42 U.S.C.A. § 1988. The Eighth Circuit reasoned that waiver of the right to claim fees could be inferred from the parties' stipulated dismissal of the action. It said:

> Furthermore, we have carefully examined the record and have found no indication that the stipulation of settlement and dismissal was entered into as a result of fraud, misconduct of the defendants, mutual mistake, or any other reason that might justify modification or reformation of the settlement or relief from the order and judgment of dismissal. There is no reason offered why the parties should not be bound by their agreement under basic principles of contract. 729 F.2d at 566-567.

Similarly, in *Jennings v. Metropolitan Government of Nashville*, 715 F.2d 1111 (6th Cir. 1983), an individual civil rights action under the Civil Rights Act of 1870, 42 U.S.C.A. § 1981, the parties settled and dismissed the action with prejudice without addressing fees. The Court enforced the intention of the parties to resolve the matter fully which "therefore, precludes a subsequent award of attorneys' fees against them." 715 F.2d at 1114.

Both the *Young* and *Jennings* courts allow parties to waive attorney's fees and imply waiver from dismissals with prejudice. Not only would the Court of Appeals herein prohibit the parties to waive fees, but also would ignore their express waiver.

In *Chicano Police Officer's Association v. Stover*, 624 F.2d 127 (10th Cir. 1980), the Court decided that 42

U.S.C.A. § 1988 does not prohibit the waiver of fees as a part of settlement. In remanding the case, the Court said:

> The settlement agreement here is at best ambiguous; the $16,000 payment could be construed as a settlement of all that is to be paid to plaintiffs *and their attorneys*. That is one of the questions to be determined on remand. The trial judge should conduct an evidentiary hearing on whether attorneys' fees were discussed and intended to be covered by the cash settlement. If not, the court should consider whether plaintiffs took actions to mislead defendant or otherwise were responsible for "special circumstances" which would make an attorneys' fees award in their favor inequitable under the *Piggie Park* standard. 624 F.2d at 132 (emphasis in original.)

Finally, in a prior case, the Ninth Circuit held that the claim for fees was personal to the attorney and not a claim of the client. *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974). Implicit in its holding in the present case is that clients acting through their next friend may not waive the attorney's right to claim fees. This is in direct conflict with the decision of the Second Circuit, in which the Court said:

> The entitlement of an attorney to fees depends upon the contractual arrangement between the attorney and client. The parties to these arrangements may well take into account the possibility of a court award of fees where statutory authority such as Section 1988 exists but a claim for such an award must itself be made by the party rather than the attorney.
>
> Section 1988's direction that fees may be awarded to "the prevailing party" is plain enough and absent evidence of a contrary congressional intent (which has not been provided), is dispositive. However, there are additional compelling reasons to reject Davis' argument. Where an attorney and client have

> independent entitlements in the same action a conflict of interest is created. Defense counsel will agree only to settlements which satisfy the attorney as well as the client. A client willing to settle for $5,000 will be thwarted if his or her attorney asserts a further right to $30,000 from the defendant. There is simply no reason to believe that Congress intended to diminish substantially the attorney's duty of undivided loyalty to his or her client. *Brown v. General Motors Corp. Chevrolet Division*, 722 F.2d 1009, 1011 (2d Cir. 1983).

The Court of Appeals herein would not allow a client to waive the claim for fees and costs, in conflict with *Brown*. Worse, by allowing the claim for fees to be that of the attorney, the Ninth Circuit creates the very conflict which it then seeks to avoid at the expense of the opposing parties. The ethics of this dilemma are more fully discussed in the following section.

3. The decision below raises important questions of federal law which have not been but should be decided by this Court.

This Court has not yet ruled on the specific question of whether it is ethical to condition settlements on the waiver of attorney's fees and costs. In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 453, fn. 5 (1982), this Court declined to so rule.

The questions presented go to the very heart of an attorney's relationship with a client—especially an attorney seeking reform of public institutions, the relationship between opposing attorneys, and the power of a district court to regulate the conduct of its judicial business.

This Court has recognized that attorneys serve both their clients and the courts before whom they appear.

Polk County v. Dodson, 454 U.S. 312 (1981). This dual role would become unmanageable if affected by the attorney's personal or financial interests. Thus, an attorney's financial interests are secondary to the primary duties to court and client. *Theard v. United States,* 354 U.S. 278 (1956).

This policy is reflected in both traditional[1] and contemporary[2] standards of professional practice. These standards require an attorney to protect faithfully, competently and zealously the client's interests. *Model Code,* Canon 7; *Model Rules,* Rule 1. They prohibit both an attorney's own interests and those of third parties from compromising the primary duty of loyalty to the client. *Model Code,* Ethical Considerations 5-2 to 5-24; *Model Rules,* 1.7(b), 1.8(f)(2) and 5.4(c). They recognize that the decision to accept an offer of settlement is that of the client, not that of the attorney. *Model Code,* Ethical Consideration 7-7 and 7-8; *Model Rules,* Rule 1.2(a). Both prohibit an attorney from acquiring an interest in the litigation. *Model Code,* Disciplinary Rule 5-103(a); *Model Rules,* Rule 1.8(j). Both require an attorney in a position of possibly violating a standard to withdraw from representation. *Model Code,* Disciplinary Rule 2-110(b); *Model*

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[1]American Bar Association: *Model Code of Professional Responsibility* (1981) (hereinafter "Model Code"). By rule, the District Court adopted the Model Code and the Code of Professional Ethics promulgated by the Idaho Supreme Court as the standards of practice for attorneys before it. Local Rule 2-109, Local Rules of Practice for the United States District Court for the District of Idaho. The Code of Professional Ethics is based on the Model Code.

[2]American Bar Association: *Model Rules of Professional Conduct* (1983) (hereinafter "Model Rules").

Rule, 1.16. The decision below cannot be reconciled with these accepted standards of professional practice.

Instead, the Court of Appeals has established its own set of professional standards contrary to the congressional authorization for district courts to prescribe standards of professional practice. 28 U.S.C.A. § 1654 (1949). In a previous case, it held that a claim for attorney's fees under 42 U.S.C.A. § 1988 is that of the attorney and not that of the client. *Brandenburger v. Thompson,* 494 F.2d 885 (9th Cir. 1974). Thus, the Ninth Circuit allows attorneys to acquire financial interests in civil rights actions, again contrary to accepted standards of professional practice. In the present case, the Ninth Circuit ruled that the district court erred in denying the attorney's request for fees, even though previously waived by the clients through their next friend and attorney. In so doing, it would allow third parties (in this case, the organization employing Respondents' counsel which conditioned funding on non-waiver of fees) to limit the independent professional judgment so dearly held by attorneys and carefully nurtured by this Court. Thus, the Court of Appeals would avoid a conflict between counsel and funding sources at the expense of the clients' interests.

In so doing, the Court of Appeals implies that the dilemma presented herein (i.e., should the attorney accept a settlement favorable to the client at the expense of financial reimbursement to the employer) is somehow novel. Yet attorneys routinely, and properly, accept cases with fees contingent on recovery. These are routinely settled by a single dollar figure, the allocation of which is a private matter between attorney and client. In civil

cases, the defendant's main concern is the total liability, not the allocation of funds. Similarly, criminal cases are negotiated by guilty pleas, even though the defense attorney paid on an hourly rate earns less than if the matter is tried. While contingency fee cases and criminal cases are different from civil rights actions seeking injunctive relief, they have a common ingredient: an attorney may not allow personal interests, whether in the form of a certain recovery in a contingency matter, increased billable hours, or funding restrictions, to influence the client's decision to accept a settlement.

Nor is the dilemma limited to settlements. An attorney who is allowed to become financially interested in the case is encouraged to bring actions, such as civil rights actions, in which an award of fees is authorized rather than an action, such as habeas corpus,[3] wherein the relief, although limited in scope, may be more congruent with the client's interests. This is typical in the "reform" litigation in which the attorney's social goals are allowed to influence the course of the litigation.

An attorney's professional judgment may be influenced by a number of factors, from career development and reputation among peers to potential clients and funding sources. Institutional reform cases often generate new cases, funding from donors and peer esteem. However, if such factors affect the attorney's judgment, it is no longer "independent": the client's interests in settlement become secondary to the attorney's reform agenda.

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[3]42 U.S.C.A. § 1988 is limited to actions under 42 U.S.C.A. §§ 1981, 1982, 1983, 1985 and 1986, Title IX of Public Law 92-318 and Title VI of the Civil Rights Act of 1964.

The attorney is no longer "professional" and our judicial system's reliance on a professional bar is diminished.

The *Model Rules* recognize the dilemma by authorizing an attorney to discuss moral or social implications with a client. *Model Rules,* Rule 2.1. However, they remain rigid: the decision to accept the settlement offer is the client's, and the attorney must withdraw from representation if he or she can no longer represent the client's interests. *Model Rules,* Rules 1.2, 1.7(b) and 1.16. The dilemma which the Court of Appeals created in *Brandenburger* is exacerbated in cases such as the present one, in which the clients are not legally competent to contract and suit is brought by their next friend who is also the attorney of record who is claiming fees.

District Courts, if the Court of Appeals' decision stands, are placed in a similar dilemma. Rule 23(e), F.R.C.P., requires them to approve class action settlements. In performing this function, the Court assumes a protective role ensuring that unnamed class members and, in this case, incompetent class members, are adequately protected.[4] If, as the Court of Appeals suggests, parties should not address the question of fees, the District Court's task of protecting class members is hindered because, as any attorney knows, more relief would be available if all issues, including the amount of fees are addressed. Even in cases of injunctive relief, services

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[4]*Norman v. McKee,* 431 F.2d 769, 774 (9th Cir. 1970), cert. den., 401 U.S. 912. Although the present class was certified under Rule 23(b) (2), F.R.C.P., and notice to class members was not required, in other class actions, any meaningful notice of a pending settlement must include promises regarding fees. *Manual for Complex Litigation,* § 1.45 (1981).

required have a cost and fewer services will be agreed to if fees are unliquidated. If the District Court must be kept unaware of the existence of a favorable collateral agreement on fees it cannot recognize a less favorable settlement on the merits. In all cases the District Court will be unable to evaluate the fairness of the total agreement. Further, requiring separate proceedings for approval of the relief and fees unnecessarily increases the workload of the district courts.

Finally, prohibiting concurrent discussion of substantive relief and fees hamstrings defense attorneys who are routinely directed at pretrial conferences to explore settlement. They must advise their clients of all potential liability and that any settlement of the merits is independent of the unresolved claim for attorney's fees. Further, to justify their actions through the discovery stage, they might well overstate the chances of success at trial which would negate the claim for fees. Moreover, if they are ethically prohibited from mentioning the fees issue to plaintiff counsel and the defendant rejects a reasonable settlement offer because of the unresolved claim for fees, defense consel would be prohibited from conveying the real reason for the offer's rejection.

Most lawsuits are resolved by settlement. Indeed, the facilitation of settlement is a strong congressional and judicial goal. The uncertainty of trials and wasted judicial time are avoided. *Airline Stewards and Stewardesses Association, Local 550 v. American Airlines*, 573 F.2d 960 (7th Cir. 1978), cert. den., 439 U.S. 876. In most cases, plaintiff counsel are asked to waive their fees. 68 A.B.A. Journal 23 (1982). It might well be that plaintiff counsel

may want to put the claim for fees on the bargaining table in exchange for added relief. Reversal of the Court of Appeals would allow counsel to exercise independent judgment on behalf of their clients, evaluate the probability and extent of relief after trial and adopt a settlement strategy calculated to achieve the client's goals.

4. The decision below departs from the accepted and usual course of judicial proceedings calling for an exercise of this Court's supervisory powers.

Respondents appealed the District Court's Order denying all costs dated May 6, 1983. Respondents did not appeal the October 22, 1984 Order of the District Court enlarging the time in which to respond to discovery. As the two orders are two discrete exercises of judicial power by the District Court, the post-settlement discovery order cannot be "fairly comprised" within the May 6, 1983 Order. Thus, the Court of Appeals should not have "vacated" the order without stating the reasons for its decision and without concluding that the District Court abused its discretion authorized by Rule 6(b), F.R.C.P.

Moreover, generally accepted appellate practice allows briefing, oral argument and an appellate record before an order is vacated. As with the attorney's fees issue, if District Courts have discretion, then reversal requires a finding that the discretion had been abused. This is not a case in which the defendants extracted a waiver of fees in exchange for less relief to the class than that demanded in the Complaint. Rather, in light of the expectation of avoiding financial liability in the form of attorney's fees, Petitioners bargained and ultimately agreed to relief broader in scope and more beneficial to

the class over the term of the settlement than that demanded in the Complaint.

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CONCLUSION

This case squarely presents the issue whether parties in a civil rights class action may simultaneously negotiate a settlement concurrently with the issues of attorney's fees and costs. This is not a case presenting questions of fraud, mistake or excusable neglect authorizing amendment to the court approved settlement.

Similarly, this is not a case in which the negotiations included overreaching or any improper negotiating practices. Rather, the negotiations in this case included open discussion and bargaining on all issues. Reversal of the Court of Appeals would not inhibit district courts from exercising their Rule 23, F.R.C.P., duty to review the fairness of settlements presented for their approval. To the contrary, reversal would enable district courts to perform this function better and more meaningfully, since all items of relief would be before them at one time.

This is not a case in which reversal of the Court of Appeals will have a chilling effect on civil rights actions. Most actions, including civil rights actions, are settled short of trial. Reversal of the Court of Appeals would allow the parties to negotiate all issues in the action and avoid all-or-nothing risk of trial.

Similarly, reversal of the Court of Appeals will not frustrate the Congressional policy embodied in 42

U.S.C.A. § 1988 of allowing awards of attorney's fees and thereby encouraging civil rights actions. A claim for fees is a valuable bargaining chip which plaintiff counsel may well wish to employ to obtain more or different relief on behalf of the class members.

In this case this Court is asked to balance the Congressional incentive for civil rights actions with the Congressional authorization to District Courts to conduct their judicial business and thereby enable parties in civil rights actions to resolve cases fully and fairly by negotiated settlement.

The question whether the parties to a civil rights class action may waive their right to claim attorney's fees during settlement negotiations is recurring, fundamental and requires resolution by a single rule of national application. It should be resolved by this Court and the Decision of the Court of Appeals should be reversed.

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

/s/ James Thomas Jones
Attorney General
Statehouse
Boise, Idaho 83720
(208) 334-2400

Counsel for Petitioners

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CIV 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and MARK CLARY, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

STIPULATION SETTLING MENTAL HEALTH CLAIMS and ORDER
(Filed April 28, 1983)

Plaintiffs and Defendants John V. Evans, Thomas L. Purce, George Bachik and Carroll Elmore (hereinafter: "defendants"), through their respective counsel of record, hereby stipulate to settle the remaining mental health claims upon the following terms:

I

Plaintiffs have the right to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, with the goal of providing them the opportunity to develop their full potential.

Defendants have the duty, so far as possible, through procedures, agreements, contracts and policies, of ensuring an available, accessible continuum of alternative community-based treatment facilities and residential programs providing mental health services to plaintiffs in the setting least restrictive of personal liberty on a statewide basis.

II

To achieve the goals of Division I, above, defendants shall:

1. Undertake on an annual basis a program of planning for the service programs administered by the Division of Community Rehabilitation of the Idaho Department of Health and Welfare, including Community Mental Health, Adult and Child Development and Institutional programs. Each individual planning effort shall be coordinated with the others and shall assess the needs of plaintiffs within each program, identify services and facilities which need to be developed or modified to address such needs, and establish an implementation plan of priorities and resouces available or required to satisfy such needs. A copy of all such plans shall be submitted to counsel for plaintiffs.

2. With all deliberate speed, seek to establish such facilities and programs identified as necessary and appropriate under Paragraph II(1) for the povision of mental health services to plaintiffs in the most normal living conditions in Idaho.

3. The organizational unit(s) of the Idaho Department of Health and Welfare having programatic responsibility for services to plaintiffs shall annually submit a

legislative budget request for funds for the operation of community-based treatment facilities and residential programs and the development of such additional facilities and programs identified as necessary and appropriate under Paragraph II(1) to serve the needs of plaintiffs. Until such time as other private or governmental agencies develop and operate community facilities and programs sufficient to meet the needs of plaintiffs identified under Paragraph II(1), defendants shall accept responsibility for the development and operation, within the limits of resources of or available to defendants, either directly or in conjunction with other providers, of such facilities and programs.

4. Defendants shall prohibit the admission of plaintiffs to any psychiatrict treatment unit of the Idaho Department of Health and Welfare where there is contact as to living and sleeping arrangements with adult mental patients, provided that plaintiffs in the following circumstances may be so admitted (subject to the protections in Paragraph II(5)):

4a. Judicial proceedings for the involuntary commitment of a plaintiff have been commenced under Section 66-329, Idaho Code, and (i) the court in such proceedings enters an order for temporary detention under Section 66-329(e), Idaho Code, (ii) the court in such proceedings determines that admission to such a facility is necessary for the protection of the plaintiff, (iii) no less restrictive alternate facility is available to the court or appropriate under the circumstances, and (iv) the admission under this exception does not extend past the time the plaintiff is dispositioned to an appropriate treatment facility or dismissal of the proceedings; or

4b. Jurisdiction under the Youth Rehabilitation Act has been waived pursuant to Sections 16-1806 or 16-1806A, Idaho Code, the plaintiff has been charged with a criminal offense and proceeded against as an adult, and is committed pursuant to Section 18-211 or 18-212, Idaho Code; or

4c. The plaintiff suffers from a mental disorder which, in the opinion of a psychiatrist, is amenable to treatment at such facility, such facility is closer to the plaintiff's home than another appropriate, available facility, and such admission does not extend for more than forty-five (45) days; or

4d. The plaintiff has been committed pursuant to Section 66-329, Idaho Code, has a history of placements in more than one residential facility with a program of services designed for children or adolescents and such placement has not benefited the plaintiff or no other appropriate facility is available and such admission does not extend for more than forty-five (45) days, provided that such admission may continue for one (1) additional forty-five (45) day period for the purpose of placement in an alternate facility; or

4e. The Idaho Department of Health and Welfare develops a psychiatric treatment unit for plaintiffs in which plaintiffs are separated from adult mental patients with respect to living and sleeping arrangements.

5. The exceptions of Paragraph II(4) notwithstanding, (i) no plaintiffs under the age of fourteen (14) years may be admitted under exceptions II(4)(a), (b), (c) or (d) to any such facility; and (ii) nor may any plaintiff be placed on a unit with an adult mental patient with a history of sexual activity as an adult with a minor.

6. The Idaho Department of Health and Welfare shall organize and utilize an interdisciplinary intra-agency committee composed of representatives of its mental health, developmental disabilities, social services and field operations programs to review the proposed admission of plaintiffs to any phychiatric treatment unit of said Department where there is contact with respect to living and sleeping arrangements with adult mental patients under exception II(4)(d). The committee shall review the proposed admission, alternative placements, the plaintiff's need for inpatient care and determine that such admission is the most appropriate available placement for such plaintiff.

7. The Administrative Director of any psychiatric treatment unit of the Idaho Department of Health and Welfare in which there is contact with respect to living and sleeping arrangements with adult mental patients shall notify counsel for plaintiffs or his successor as reflected in the records of the above-entitled action of the admission of each plaintiff under exceptions II(4)(a), (c), or (d) and extension of any admission under II(4)(d). The notification shall include the plaintiff's name and date of birth, the name and address of the plaintiff's parent(s), guardian(s) or other person(s) acting in loco parentis, other facilities considered prior to such admission and the name and address of the official to contact concerning the admission.

8. All placements of plaintiffs shall be in the environment least restrictive of personal liberty in which appropriate services can be provided with a preference for (i) placement in the plaintiff's home and (ii) placement in a psychiatic treatment unit in which there is con-

tact with respect to living and sleeping arrangements with adult mental patients only after all other appropriate placements have been attempted or considered and rejected.

9. The defendants shall provide plaintiffs with appropriately prescribed mental health services according to each plaintiff's individual treatment plan, including, where appropriate, diagnosis, evaluation, therapy and counselling. Service and decisions concerning services shall be provided or made by professions qualified by education, training or experience to make the particular decision or provide the particular service involved. Treatment decisions concerning plaintiffs admitted to a psychiatric treatment unit of the Idaho Department of Health and Welfare must be made by professionals experienced in providing such services or making such decisions in the psychiatric setting; provided that day-to-day decisions regarding the care of such plaintiffs—including decisions that must be made without delay—may be made by other persons if such other persons are subject to the direct supervision of a qualified professional and each such decision is reviewed by a qualified professional.

10. For each plaintiff, defendants shall develop an individualized treatment or service plan, which, in the case of plaintiffs admitted to an inpatient psychiatric treatment unit, shall meet the requirements of "Rules Governing Hospitals", Title 2, Chapter 1, Rules and Regulations of the Department of Health and Welfare.

11. Defendants shall provide adequate psychiatric, psychological or other counseling and programming, as considered appropriate in light of each plaintiff's individual treatment plan, including at least five (5) hours of therapy or other direct services per week.

12. In developing and implementing the individual treatment plans, defendants shall include the least possible reliance on medications appropriate under the circumstances.

13. The Administrative Directors of each psychiatric treatment unit of the Idaho Department of Health and Welfare shall keep records containing a description of any extraordinary incidents (including sexual incident, physical attacks, threats or accident) in such facility involving any plaintiff. Each report must be prepared by a staff member noting personal knowledge of the incident or other source of information. The Administrative Director shall investigate each report. Modifications to the individual treatment plan of each plaintiff involved in each such report must be considered following verification of a report.

14. Upon verification of an incident report, the Administrative Director of each psychiatric treatment unit of the Idaho Department of Health and Welfare shall take the necessary stepts to protect such plaintiff from recurrence of such incident.

15. With respect to plaintiffs admitted to an inpatient psychiatric treatment unit, other than one of the Idaho Deparment of Health and Welfare, in which there is contact with respect to living and sleeping arrangements with adult mental patients, an employee of such Department shall be responsible for the monitoring of the care and progress of each such plaintiff. In preparing reports regarding such plaintiff, either pursuant to Paragraph II(20) below or Section 66-337, Idaho Code, such employee shall review all extraordinary incidents (including sexual incidents, physical attacks, threats or accidents) involving the plaintiff, include a description of

any such incident in such report, consider modifications to the plaintiff's treatment or service plan or a change in placement as may be necessary to protect such plaintiff from recurrance of such incident.

16. The individual treatment plan of each plaintiff admitted to a psychiatric unit of the Idaho Department of Health and Welfare shall be developed upon admission and reviewed as needed but at least once every six (6) months or upon verification of an incident report. The review shall be conducted either by the facility's quality assurance committee, which committee must include at least one (1) qualified professional with at least two (2) years' clinical experience in the treatment of children or adolescents, or by an interdisciplinary committee appointed by and reporting to the Administrative Director, the members of which committee must have at least two (2) years' clinical experience in the treatment of children or adolescents.

17. In the event any plaintiff admitted under the exceptions contained in Paragraph II(4) has exhausted the programs and treatment resources available through the Idaho Department of Health and Welfare and such plaintiff's clinical condition does not improve or deteriorates in any six (6) month period, the Administrative Director of the facility shall refer such plaintiff to a licensed psychologist or psychiatrist specializing in children's or adolescent's treatment or such other professional specializing in an area appropriate to such plaintiff's condition for additional case consultation.

18. Each individual treatment or service plan contain a placement assessment. The placement assessment

must identify the least restrictive environment most capable of meeting the needs and capabilities of such plaintiff. If the plaintiff is not placed in such environment, the plan must reflect why the plaintiff was not so placed.

19. Each individual treatment plan of a plaintiff admitted to an inpatient treatment facility must include a discharge plan. The discharge plan must include a projected date for the transfer, release or discharge from such facility and the programming necessary to achieve such result.

20. The parent(s), guardian(s) or other person(s) acting in loco parentis of each plaintiff must be notified on at least a semi-annual basis of their plaintiff's vocational, social, living skills, progress and clinical condition.

21. State Hospital North, State Hospital South, and any other inpatient psychiatric treatment unit of the Idaho Deparment of Health and Welfare shall establish in consultation with plaintiffs' counsel (see below) and implement a patient grievance procedure. Such procedure shall be available to each plaintiff and his or her parent(s), guardian(s) or other person(s) acting in loco parentis, and provide a method for the plaintiff or such other person to disagree with the individual treatment plan or its implementation.

22. Each plaintiff's individual treatment plan must be separate from and coordinated with such plaintiff's individual education plan.

23. At least once each year so long as the court retains jurisdiction of this matter, counsel for plaintiffs, counsel for defendants and the Administrator of the Division of Community Rehabilitation of the Idaho Department of Health and Welfare shall meet and confer con-

cerning defendants' implementation of this Stipulation and any other items of conern to plaintiffs.

24. The court may retain jurisdiction over this matter for five (5) years or until satisfied by stipulation or otherwise that the claims for relief as alleged in the Complaint herein have been adequately addressed.

25. Plaintiffs and defendants shall each bear their own costs and attorney's fees thus far incurred, if so approved by the Court.

26. This Stipulation may be merged into a judgment of the court fully resolving the above-entitled action.

DATED this — day of March, 1983.

/s/ James Wickham
Deputy Attorney General
Attorney for Health and
Welfare Defendants

Welfare

DATED this — day of March, 1983.

/s/ Thomas C. Frost
Deputy Attorney General
Attorney for Defendant
John V. Evans

DATED this — day of March, 1983.

/s/ L. Charles Johnson, III
Attorney for Plaintiffs

ORDER

IT IS SO ORDERED.

/s/ Marion J. Callister
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

ORDER DENYING ALL COSTS
(Filed May 11, 1983)

The above-entitled matter came on for hearing on April 28, 1983, in Pocatello, Idaho, on plaintiffs' motion for consideration of costs and attorney fees on settlement in the above-entitled action. This action was settled by a stipulation, settling mental health claims, which was approved by (and became the order of) this Court on April 28, 1983. The stipulation provided that each party "shall bear their own costs and attorney fees thus far incurred, if so approved by the court."

For good cause shown, and based on the Stipulation Settling Mental Health Claims, and the other pleadings, documents and papers on file in this matter, and for the further reasons stated at the hearing on the motion for

attorneys fees, IT IS ORDERED that the plaintiffs' motion for consideration of costs and attorney fees on settlement be, and the same is hereby, DENIED.

DATED this 6th day of May, 1983.

/s/ Marion J. Callister, Chief Judge
United States District Court

Charles Johnson, III
JOHNSON AND OLSON, CHARTERED
303 Spaulding Building
Pocatello, Idaho 83204
Telephone: (208) 232-7926

Lawyer for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OR IDAHO

Case No. CIV 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson and Mark Clary, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

NOTICE OF APPEAL
(Filed May 31, 1983)

NOTICE IS HEREBY GIVEN that plaintiffs above named hereby appeal to the United States Court of Appeals for the Ninth Circuit from the "Order Denying All Costs" in this action dated May 6, 1983.

/s/ Charles Johnson, III
JOHNSON AND OLSON,
CHARTERED
303 Spaulding Building
Pocatello, Idaho 83204

Lawyer for Plaintiff

CERTIFICATE OF MAILING

I CERTIFY that I mailed a true and correct copy of the foregoing to the attorneys of record herein, by placing same in the United States mail, postage prepaid, addressed as follows:

James Wickham, Esquire
Deputy Attorney General
Legal Services Division
Department of Health and Welfare
450 West State - 7th Floor
Boise, Idaho 83720

Thomas Frost, Esquire
450 West State
7th Floor
Boise, Idaho 83720

on this 23rd day of May, 1983.

/s/ Charles Johnson
Licensed Lawyer

JAMES WICKHAM
Deputy Attorney General
Legal Services Division
Department of Health and Welfare
450 West State - 7th Floor
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THOMAS C. FROST
Deputy Attorney General
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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. Civ. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

ORDER
(Filed August 12, 1983)

The parties having stipulated to resolve the remaining mental health claims, having further stipulated that should the Court conclude that it is ethical for attorneys admitted to practice before this Court to negotiate a waiver of attorneys fees and costs concurrently with the merits of the claims that the stipulation would be tendered for consideratiaon by the Court with a waiver provision, and the Court having concluded that the practice is ethical, having approved the settlement stipulation and having denied the plaintiffs' request for attorney's fees and costs and the plaintiffs' having appealed said denial, and it appearing to the court that suspension of the stipulation pending appeal is necessary to preserve the expectations of the parties while the appeal is pending;

IT IS HEREBY ORDERED that Health and Welfare Defendants' duties under the Stipulation Settling Mental Health Claims and Order entered April 28, 1983 be and the same are hereby suspended while said appeal is pending.

DATED this 10th day of August, 1983.

/s/ Marion J. Callister
District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

D.C. # CV 80-4091
MJC

JEFF D., PAUL E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs-Appellants,

vs.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellees.

OPINION
(Filed September 20, 1984)

Appeal from the United States District Court
for the District of Idaho

Marion J. Callister, District Judge, Presiding
Argued and submitted March 8, 1984

Before: SCHROEDER, FARRIS, and REINHARDT, Circuit Judges.

SCHROEDER, Circuit Judge.

This is an appeal from an order denying attorney's fees in a 42 U.S.C. § 1983 class action to improve conditions of mentally and emotionally handicapped children institutionalized by the State of Idaho. The attorney's fee application followed a settlement agreement in which the

defendants agreed to institutional improvements favorable to the interests of the class, but declined to bear any of plaintiffs' attorney's fees. This appeal as to the enforceability of the settlement's provision on attorney's fees is an example of problems that have arisen when class action settlement negotiations have been undertaken in conjunction with negotiation of attorney's fees. The order denying the fees is a final order and we have jurisdiction under 28 U.S.C. § 1291. *Brandenburger v. Thompson*, 494 F.2d 885, 887-88 n.2 (9th Cir. 1974).

The settlement negotiations in question began some two and one-half years after filing of the suit—after settlement of other claims, extensive discovery and certification of a class of handicapped, institutionalized children. In the merits of the action, the class alleged infringement of constitutional rights and sought compliance with federal and state rehabilitation and education laws.[1] During the negotiations, the defendants offered virtually all of the injunctive relief plaintiffs had sought, and more than the district court during earlier hearings had indicated it was willing to grant. However, defense counsel stated during the negotiations that defendants' agreement was conditioned upon the plaintiffs' counsel's waiver of attorney's fees. Plaintiffs' counsel at that time was employed by a public interest law firm, which had instructed him not to waive fees.

Aware of his ethical obligation to accept this favorable settlement on behalf of his clients, but unhappy with the prospect of foregoing the attorney's fees to which

he believed 42 U.S.C. § 1988 entitled him, plaintiffs' counsel negotiated a condition on the waiver of fees: approval by the district court. The district court approved the settlement on the merits and, then, upon plaintiffs' filing of a motion for attorney's fees, denied fees based upon the stipulation.

In this appeal, the defendants do not maintain that there is any basis, apart from the stipulation, for the denial of attorney's fees. Section 1988 of Title 42 authorizes award of attorney's fees to the prevailing parties in civil rights actions of this nature. "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982).

There is no question that the plaintiffs are prevailing parties by virtue of the settlement, *Maher v. Gagne*, 448 U.S. 122, 129, 100 S. Ct. 2570, 2575, 65 L. Ed. 2d 653 (1980). Nor is there any question that plaintiffs' counsel, under ordinary application of section 1988, is deserving of an award of reasonable attorney's fees. *See, e.g., Hensley v. Eckerhart*, 103 S. Ct. 1933, 1937-38 (1983) (section 1983 plaintiff entitled to attorney's fees in proportion to success achieved). The defendants' only contention is that the appellants should be bound by the stipulation waiving fees. Defendants point out that although this court has disapproved the practice of simultaneous negotiation of attorney's fees and settlement of the merits of the lawsuit, we have not categorically declared the practice unethical. *See Mendoza v. United States*, 623

F.2d 1338, 1353 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981).

Defendants rely upon the general principle that parties, and their lawyers, are bound by their stipulations. *See, e.g., Herman v. Eagle Star Insurance Co.,* 396 F.2d 427 (1968) (court need not examine evidence for reliability if parties have stipulated to it). Defendants correctly assert that plaintiffs' counsel did indicate willingness to forego fees if the court approved.

The principle that generally binds lawyers and litigants to stipulations has limited applicability in the present situation, however. The question here is whether the court, in reviewing a class action settlement in a civil rights action, properly approved the waiver of attorney's fees simply because it was part of the settlement to which the parties had agreed. We answer the question in the negative, because the court has a duty to review the reasonableness of all the terms of class action settlement agreements, particularly those related to attorney's fees. *See* Fed. R. Civ. P. 23(e); C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1797, 1803 (1972). Moreover, this general duty in class action settlements is reinforced by the clear public policy of 42 U.S.C. § 1988 to award reasonable attorney's fees in civil rights actions. *See Hensley v. Eckerhart,* 103 S. Ct. at 1937.

Rule 23(e), reflecting the equitable principles in which class actions are rooted, provides that the terms of all class action settlements be approved by the court. "A class action shall not be dismissed or compromised without the approval of the court . . . ." Fed. R. Civ. P. 23(e). This is to ensure that all members of the class are ade-

quately protected. *See Norman v. McKee,* 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied,* 401 U.S. 912 (1971); C. Wright & A. Miller, *supra,* at § 1797. In asking the district court and this court to approve a waiver of attorney's fees as a consideration of a settlement solely because it was a term of the settlement, defendants ask the court to disregard the duty imposed by Rule 23. Indeed, plaintiffs' counsel in this case alerted defense counsel to that duty during the negotiations.

Courts have given particular attention to attorney's fees in class actions. Judges long have been concerned with protecting the class representatives who had benefited the entire class but had borne all of the expenses. As a matter of fairness, courts therefore have awarded attorney's fees in class actions under equitable principles, and as an exception to the general rule that attorney's fees are not available in the absence of contract or statute. *See Hall v. Cole,* 412 U.S. 1, 4-5, 93 S. Ct. 1943, 1945-46, 36 L. Ed. 2d 702 (1973); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391-92, 90 S. Ct. 616, 625, 24 L. Ed. 2d 593 (1970); *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166-67, 59 S. Ct. 777, 781, 83 L. Ed. 1184 (1939); C. Wright & A. Miller, *supra,* § 1803.

Similar considerations have prompted courts to award attorney's fees in situations in which a private individual successfully acted as a "private attorney general," to vindicate an important public policy. The Supreme Court so held in *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, 88 S. Ct. 964, 966, 19 L. Ed. 2d 1263 (1968) (per curiam), and this court so held in *Brandenburger,* 494 F.2d at 888-89. This court and other courts have held that attorney's fees may be awarded whether the plaintiff's law-

yer is privately retained counsel or, for example, a salaried employee of a public service organization. *Shadis v. Beal,* 685 F.2d 824, 830-31 (3d Cir.), *cert. denied,* 103 S. Ct. 300 (1982) (if legal service organizations could not receive fee awards, an important type of private attorneys general would be less willing to pursue public interest cases). *Brandenburger,* 494 F.2d at 889. Courts, accordingly, have long recognized the strong public policy considerations in favor of awarding attorney's fees in suits in which representative parties serve interests broader than their own self interest.

These considerations take on greater force in civil rights cases. The Congress expressed approval of attorney's fees awards in such cases when it passed 42 U.S.C. § 1988, in response to *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975). In *Alyeska,* the Supreme Court had construed very narrowly federal courts' equitable powers to award attorney's fees in the absence of statutory authorization, 421 U.S. at 269, 95 S. Ct. at 1629 (Brennan, J. & Marshall, J., dissenting). Congress thereupon provided the statutory authorization by enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. *See* S. Rep. No. 1011, 94th Congress, 2nd Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5909. The Senate report specifically adopted the Supreme Court's pre-*Alyeska* language of *Piggie Park* to underline the important public policy served by attorney's fee awards in civil rights cases. "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts."

S. Rep., *supra*, at 5910 (quoting *Piggie Park*, 390 U.S. at 402). Therefore, a successful section 1983 claimant "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep., *supra*, at 5912 (quoting *Piggie Park*, 390 U.S. at 402). Thus, a district court is normally obliged to award fees to a successful section 1983 plaintiff, *Hensley v. Eckerhart*, 103 S. Ct. at 1937, and successful plaintiffs include those who have negotiated successful settlements. *Maher v. Gagne*, 448 U.S. at 129, 100 S. Ct. at 2575.

There is a special reason for the district court to scrutinize for fairness any provision for attorney's fees in a class action settlement. When attorney's fees are negotiated as part of a class action settlement, a conflict frequently exists between the class lawyers' interest in compensation and the class members' interest in relief. In the present case, the attorney was asked to choose between forgoing any compensation while obtaining a favorable settlement on behalf of the class, or declining the benefit for the class in hope of eventually receiving a fee award. Plaintiffs' attorney here accepted the benefit for the class and turned to the court for his own protection. In the more common situation, the reverse is true. The attorney negotiates the fee for himself, and members of the class seek court review because of actual or perceived unfairness to them. *See, e.g., Mendoza v. United States*, 623 F.2d at 1352-53. The conflict of interest underlying each situation, however, is similar.

The problem has led to discussion and scholarly debate. *See, e.g.*, Levin, *Practical, Ethical, and Legal Considerations Involved in the Settlement of Cases in which*

Statutory Attorney's Fees Are Authorized, 14 Clearinghouse Rev. 515 (1980); Note, *Attorneys' Fees—Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fees in a Title VII Class Action,* 51 Temple L.Q. 799 (1978); Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations,* 131 U. Penn. L. Rev. 793 (1983). One bar association has concluded that simultaneous negotiation of settlement and fees is unethical. New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 80-94, *reprinted in* 36 The Record of the Association of the Bar of the City of New York 507 (1981). The crux of the problem is the possibility of diverging interests of the lawyer and the class. The attorney may be tempted with a generous fee offer as *quid pro quo* for a less than optimal settlement. Alternatively, the defendant may condition settlement on the attorney's waiver of fees creating a particularly severe conflict when important interests of class members are at stake.

To avoid this conflict, this circuit has followed the seminal decision of the Third Circuit in *Prandini* and has disapproved simultaneous negotiation of settlements and attorney's fees. *Mendoza v. United States,* 623 F.2d at 1352-53. We did not there hold that stipulated attorney's fees in such cases were per se unacceptable. We stated that "we do not believe rejection of a resulting settlement in every case [of simultaneous negotiations] is appropriate." In *Mendoza,* we accepted the simultaneously negotiated stipulation for the payment of fees on a showing of unusual circumstances—which included the United States Department of Justice's participation, as an intervenor

representing the public interest, in the negotiations. This minimized the effect of conflict of interest on the settlement.

In this case, there were no such unsual circumstances. Attorney's fees should not have been a part of the settlement of the claims of the class. The historical background of both Rule 23 and section 1988, as well as our experience since their enactment, compel the conclusion that a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court. Rather, the court should make its own determination of the fees that are reasonable, giving due consideration to the appropriate factors. *See Hensley v. Eckerhart*, 103 S. Ct. at 1937 n.3; *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 838 (9th Cir. 1982); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

Reversed and remanded for determination of reasonable attorney's fees.

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1 Plaintiffs claimed that inadequate care contravenes the due process and equal protection provisions of the fifth and fourteenth amendments as well as the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982), the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400-1461 (1982), the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081 (1982), Article X § 1 of the Idaho Constitution, and certain Idaho education and penal statutes.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., MINORS, individuaully and on behalf of the class they represent, by and through their next friend, CHARLES JOHNSON,

Plaintiffs,

vs.

JOHN V. EVANS, MILTON G. KLEIN, JERRY EVANS, GEORGE BACHIK, and CARROLL ELMORE, individually and in their official capacities, their successors in office, title, and interests,

Defendants.

ORDER

(Filed October 22, 1984)

PURSUANT TO RULE 4(b), F.R.C.P., the period in which Defendants, John V. Evans, Rose Bowman (successor in office to Thomas L. Purce), George Bachik and William Gruzinski (successor in office to Carroll Elmore) shall respond to all matters which are now or may be

pending in this Court shall be tolled until the latter of expiration of ninety (90) days after 1) entry of the mandate herein by the United States Court of Appeals; 2) denial of said Defendants' Petition for Writ of Certiorari in the Supreme Court; 3) remand of the matter to this Court after action by the Supreme Court; or 4) denial of said Defendants' Motion to Rescind Tender of Settlement, should they elect to so move.

DATED this 22 day of October, 1984.

Honorable Marion J. Callister
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

D.C. # CV 80-4091
MJC

(District of Idaho)

JEFF D., PAUL E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs-Appellants,

v.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellees.

ORDER

(Filed November 6, 1984)

Before: SCHROEDER, FARRIS, and REINHARDT, Circuit Judges.

The Appellants' Second Emergency Motion for Stay for Injunction Pending Appeal is granted. The district court's order of October 22, 1984, is vacated. The parties shall comply with their Stipulation Settling Mental Health Claims.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

(District of Idaho)

JEFF D., PAUL E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs-Appellants,

v.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellees.

ORDER

(November 21, 1984)

Before: SCHROEDER, FARRIS and REINHARDT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

DC# CV 80-4091 MJC
Idaho (Pocatello)

JEFF D., PAUL E., JOHN M., and DUSTY R., etc.,
Plaintiffs-Appellants,
vs.
JOHN V. EVANS, etc., et al.,
Defendants-Appellees.

ORDER

(Filed Devember 6, 1984)

Before: SCHOEDER, FARRIS and REINHARDT, Circuit Judges.

The mandate in this case has issued. The motion for stay and the second petition for rehearing and suggestion for rehearing en banc are both denied as moot.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
MAR 29 1985
JOSEPH F. [illegible] JR.
CLERK

Case No. 84-1288

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK, and WILLIAM GRUZINSKI,

Petitioners,

vs.

JEFF D., PAULA E., JOHN M, and DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,

Respondents.

ON WRIT OF CERTIORARI FROM
THE UNITED STATES SUPREME COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Page
	Table of Contents	i
	Table of Authorities	ii
I.	ADDITIONAL STATEMENT OF FACTS OF CASE	1
II.	QUESTION PRESENTED FOR REVIEW . .	3
III.	LEGAL ARGUMENT	3
	A. The Ninth Circuit Decision Was Correct	3
	B. Decisions Below Do Not Conflict	8
IV.	CONCLUSION	9
	Affidavit of Mailing	12

TABLE OF AUTHORITIES

Cases:	Page
Carson v. American Brands, 450 U.S. 79 (1981), ...	5
Chicano Police Officer's Association v. Stover, 624 F.2d 127 (10th Cir. 1980) . .	7, 8
Hensley v. Eckerhart, ___ U.S. ___, 76 L.Ed.2d 40 (1983)	7, 10
Jeff D. vs. Evans, 743 F.2d 648 (9th Cir. 1984) . . .	3
Jennings vs. Metropolitan Gov. of Nashville, 715 F.2d 1111 (6th Cir. 1983). . .	8
Newman vs. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)	6
White vs. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), ...	6, 10
Young v. Powell, 729 F.2d 563 (8th Cir. 1984) . . .	8

Statutes:	
42 U.S.C. § 1988	3, 4, 7, 10
Federal Rule of Civil Procedure (FRCP) 23	4

I. ADDITIONAL STATEMENT OF FACTS OF CASE

The State of Idaho established a pattern and practice in the 1970's of placing mentally ill children, as young as age eleven, with adult mental patients (including child molesters) with absolutely no specialized treatment or education services whatsoever. This was unconstitutional and violative of several statutes as discussed by Petitioners on page 5 of their brief.

After the filing of this litigation, the Idaho State Department of Education, by and through defendant Jerry Evans, immediately entered into meaningful settlement negotiations which resulted in a stipulation settling the education claims. In this stipulation the Department of Education agreed to provide to the plaintiff class the education services required by federal and state law. Attorneys' fees were not asserted at that time against the Department of Education because of the good faith shown by them in immediately providing the required educational services.

However, the Idaho State Department of Health and Welfare, including the Petitioners herein, did not join in this settlement. Rather, significant further litigation, discovery, depositions and other pre-trial proceedings were required prior to the time of reaching the negotiated settlement of the claims against Petitioners. The attorneys' fees were thereby significantly increased.

Approximately one week prior to trial the Petitioners drafted and offered the stipulation settling mental health claims and order which is attached as an appendix to the Petitioners' brief. The Respondents, deeming it clearly in the best interest of the class plaintiffs, were ethically bound to accept the settlement; as acknowledged by Petitioners on page 5 of their brief. However, the Respondents' counsel believed it was improper for the settlement to be conditional on the waiver of attorneys' fees. Therefore, the parties stipulated that each party would bear their own attorneys' fees and costs thus far incurred, "if so approved by the court." (Appendix to Petition, page 10a).

There is nothing in the record to support Petitioners' contention that there was a separate stipulation "that the settlement was to be tendered to the District Court for approval only if it concluded that the practice [of requiring a waiver of fees as a condition of settlement] was ethical." (See Petition, pages 6, 8 and 9.) The record does reflect that the merits of this case were settled regardless of what subsequently transpired; and that the attorneys' fees would be deemed waived by Respondents only "if so approved by the court."

Subsequent to this time, the Petitioners have consistently and systematically attempted to avoid the effects of the merits of the stipulation settling mental health claims and

order through several procedures. These have included attempting to stay the effects of that motion in the District Court, and in the Court of Appeals, and most recently by attempting to redefine the class in the District Court. The Petitioners have also refused to respond to discovery requests regarding compliance during the time of the appeal in this matter and are believed to be out of compliance with the stipulation. The Court of Appeals has overturned Petitioners' attempts to avoid compliance with the merits of the stipulation settling mental health claims and order. (See Appendix to petition, page 28a.)

II. QUESTION PRESENTED FOR REVIEW.

The question in this case is whether this Court should review a decision overruling a Federal District Court's approved settlement of a civil rights class action for declaratory and injunctive relief conditioned upon a waiver of plaintiffs' costs and attorneys' fees under 42 U.S.C. § 1988?

III. LEGAL ARGUMENT

A. The Ninth Circuit Decision Was Correct.

Respondents contend that this question has been answered correctly by the Court of Appeals in Jeff D. vs. Evans, 743 F.2d 648 (9th Cir. 1984). Respondents' would further refer the Court to Respondents' Brief on Appeal attached hereto as Exhibit "A";

this discusses fully the issue, the purposes of the Attorneys' Fees Act (42 U.S.C. § 1988) and the law at the heart of this appeal, should the Court desire to review the same.

Contrary to the contention of Petitioners, the Court of Appeals did clearly, adequately and fully address the question of whether the right to request attorneys' fees could be waived. Any reasonable reading of that court's decision will indicate that, in each case where a defendant is able to condition a settlement on the merits upon a waiver of attorneys' fees and costs, the practice is condemned because of the inherent ethical conflict which face plaintiffs and their counsel in such actions.

The District Court below failed to exercise its obligation under Federal Rule of Civil Procedure (FRCP) 23(e) to review and approve the terms of the settlement for fairness and reasonableness on the attorneys' fees issue. Clearly, under FRCP 23 a major factor in approval of such settlements is the benefit due the class (and their counsel). The Respondents' rule, if adopted, would deprive the District Courts of their mandate under FRCP 23(e) to approve such settlements; with the result of potential over-reching and conflicts FRCP 23(e) is designed to prevent.

The Petitioners first state that the Court of Appeals framed the question to be decided as follows: "whether the court, in reviewing a class action settlement in a civil rights action,

properly approved the waiver of fees simply because it was part of the settlement to which the parties had agreed?" (See page 6 of Respondents Brief.) However, the "Stipulation Settling Mental Health Claims and Order" approves the settlement of this class action and the waiver of costs and attorneys' fees only if so approved by the court. Clearly, the parties contemplated a settlement on the merits, with the waiver of attorneys' fees contingent on the court's approval.

Thus, Carson v. American Brands, 450 U.S. 79 (1981), which recognizes the right of the parties in an employment discrimination action (42 U.S.C. § 2000) for money damages to compromise their dispute on mutually agreeable terms, is inapplicable. In Carson, this Court held that only a District Court's decision to enter a proposed stipulation was an appealable order.

In this case, the parties have compromised and settled their dispute on mutually agreeable terms; one of the terms of that settlement, drafted by Petitioners, was that the District Court would decide whether the waiver of attorneys' fees as a condition of settlement was proper. The District Court held that such practice was proper but the Appellate Court disagreed. However, the parties had stipulated to be bound by the decision of the court on the fees issue only; the merits had been settled.

Further, in White vs. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), this Court was confronted with a motion for attorneys' fees made over four months after a consent decree was entered in a civil rights action. This Court found that "the court's decision of entitlement to fees will therefore require an inquiry separate from the merits" and remanded the attorneys' fees petition for consideration by the Court. However, the Court recognized the obvious result that where a party had made a surprise post-judgment motion for attorneys' fees the cases would "support a denial of fees in cases in which a post-judgment motion unfairly surprises or prejudices the affected party."

That is clearly not the case in the instant situation. The Respondents had stipulated to waive costs and attorneys' fees only if so ordered by the court. The parties stipulated and agreed that this issue would be presented to the court for a decision under the express terms of the stipulation. There can be no claim that such motion made in this case "unfairly surprises or prejudices" the Petitioners.

Similarly, Newman vs. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) is also irrelevant; in that case this Court held an award of fees entirely proper in circumstances similar to those at bar. The Ninth Circuit Court of Appeals in this case has held that the award of attorneys' fees was not unjust; but, in fact, was just.

Moreover, no party has been "mislead" in this matter as was present in Chicano Police Officer's Association v. Stover, 624 F.2d 127 (10th Cir. 1980). Rather, all the parties negotiated and settled the case with the expectation that the court would decide the attorneys' fees issues. Simply because the Respondents sought to have a redetermination of that issue by the Ninth Circuit Court of Appeals, which they felt was wrongly decided by the District Court, the Petitioners feel constrained to call the settlement unjust, unfair and prejudicial and "return to the bargaining table on the merits." Such a result was one that was clearly not contemplated by the parties, not in the best interest of the plaintiff class, and detrimental to the interests of justice in general. The court must not approve such a result.

The issue in this case has been indirectly decided by this Court in Hensley v. Eckerhart, ___ U.S. ___, 76 L.Ed.2d 40 (1983), in which the court held that the District Courts have the discretion to award attorneys' fees under 42 U.S.C. § 1988. However, the Court of Appeals did not remand the instant case for a determination as to whether Respondents are prevailing parties because they made that determination based on the clear evidence in this matter. This should be beyond dispute, especially in light of the Petitioners' consistent and systematic attempts, even in this Court, to return once again to the merits of the litigation which was previously and expressly settled. Why, if

the Petitioners had prevailed, would the Petitioners be so intent on relitigating or renegotiating the merits of this matter? It is clear that the Petitioners were guilty of a denial of fundamental constitutional rights of the plaintiff class and the Respondents prevailed in obtaining substantial, albeit as yet unrealized, relief from these practices.

B. Decisions Below Do Not Conflict.

The Petitioner's other cited decisions of Young v. Powell, 729 F.2d 563 (8th Cir. 1984); and Jennings vs. Metropolitan Gov. of Nashville, 715 F.2d 1111 (6th Cir. 1983), were both actions that were settled individually (not as class actions) and dismissed with prejudice without addressing attorneys' fees. The courts recognized that a dismissal with prejudice of an individual action probably precludes a subsequent award of attorneys' fees.

Different facts are present in this case. The Respondents prevailed on the substance of their claims in the District Court, as the Court of Appeals found. Hence, the cases of Young and Jennings (supra) are inapplicable to the instant situation, especially since these were not class actions.

Moreover, Chicano Police Officer's Association vs. Stover, 624 F.2d 127 (10th Cir. 1980), does not apply to this situation. In that situation there was a settlement of an individual (not class action) lawsuit for $16,000.00 in cash

which did not mention attorneys' fees at all. In this case attorneys' fees were specifically mentioned and discussed and ordered waived only if the Court so approved. Hence, such fees were clearly not included as part of the judgment, and the defendants were not misled nor are there any otner special circumstances warranting reversal of the decision of the Ninth Circuit Court of Appeals.

IV. CONCLUSION

The parties in this case have clearly and concisely stipulated to resolve their claims on the merits in the Stipulation Settling Mental Health Claims and Order. The decision as to the propriety of the forced waiver of Responcents' attorneys' fees was, by stipulation of the parties, left to be decided by the Court. The Court approved such waiver of attorneys' fees, and the Ninth Circuit Court of Appeals reversed for the reasons outlined in their decision.

As the Petitioners themselves indicate, this is not a case presenting questions of fraud, mistake, or excusable neglect authorizing amendment to the court approved settlement. Similarly, this is not a case in which the negotiations included overreaching or any improper negotiating practices. The negotiations in this case included open discussion and bargaining on all the issues. All issues, including the decision to submit

the decision on the waiver of costs and attorneys' fees to the court, were agreed to by the parties.

Petitioners have cited no class action civil rights settlement decision in conflict with that of the Ninth Circuit below. In fact, the only two decisions on point, White v. New Hampshire (supra) and Hensley vs. Eckerhart (supra) both support Respondents.

Reversal of the Ninth Circuit would mean that a District Court has no duty to independently review class action settlements for fairness. Rather, the issue would be left to the parties with forseeable harmful consequences.

This case presents no novel, or disputed question for this Court. Rather, it presents the rather common-place issue of an over-worked District Court's erroneous approval of one provision of a class action settlement which was fortunately corrected on appeal.

This class action would probably never have been brought without the attorneys' fees provision of 42 U.S.C. § 1988. As the Petitioners indicate, most of these civil rights actions are settled short of trial. To allow a forced waiver of attorneys' fees as a condition of settlement will result in a chilling effect on similar civil rights actions in the future. The indigent and those not financially able to afford counsel will be left to the whim and caprice of the state or others who may seek

to deny fundamental rights. Instead of using declaratory/injunctive relief actions, litigants may be forced to claim money damages (where possibly inappropriate) to generate funds to litigate such issues.

Respondents request the Court deny the Petition For Writ of Certiorari, not just for these plaintiffs, but for plaintiffs who may in the future desire to enforce the minimal civil rights of the extremely destitute. The decision of the Ninth Circuit should be left to stand as a bench-mark for future litigants in these areas, and the law allowed to develop. To grant the writ of Certiorari, and review the decision of the Ninth Circuit, will condemn the Respondents and other similarly situated to a world in which their ability to obtain counsel will be restricted, and in many cases, eliminated.

The Court must not allow this to happen. Rather, since Petitioners have presented nothing new, that could not have been presented below, Certiorari should be denied and the decision below left intact.

WHEREFORE, the Respondents pray that the Writ of Certiorari prayed for in this matter be denied.

RESPECTFULLY SUBMITTED.

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Pocatello, Idaho 83204

Lawyers for Respondents

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing, by placing same in the United States mail, postage prepaid, addressed as follows:

James Wickham, Esquire
Deputy Attorney General
DEPARTMENT OF HEALTH & WELFARE
450 West State Street, 7th Floor
Boise, Idaho 83720

James Thomas Jones
Attorney General
State of Idaho
Statehouse
Boise, Idaho 83720

on this 25 day of March, 1985.

Licensed Lawyer

EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, Plaintiffs/Appellants, vs. JOHN V. EVANS, MILTON G. KLEIN, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities. Their Successors to Office, Title and Interest, Defendants/Appellees.	Ninth Cir. No. 83-3639 Dist. Case No. CIV 80-4091 APPELLANT'S BRIEF

Appeal from the United States District Court
District of Idaho
Honorable Marion J. Callister
(80-4091)

Charles Johnson, III
Legal Aid Project
Johnson Olson Robison, Chartered
303 Spaulding Building
Pocatello, Idaho 83204

LAWYER FOR APPELLANTS

TABLE OF CONTENTS

		Page
	Certification Required By Ninth Circuit Court of Appeals Rule 32 (a) (7)	ii
	Table of Contents	iii
I.	Table of Authorities	iv
II.	Statement of the Case	1
	A. Jurisdiction and Timeliness Local Rule 13(b) Statement	1
	B. Nature of the Case	1
	C. Course of Proceedings Below	2
III.	Issues Presented	6
IV.	Argument	6
	A. Authority for Attorneys Fees	6
	B. Discussion of Merits and Fees Simultaneously Improper	12
	C. Procedure in This Case	17
	1. Approval of the Settlement but Without the Fee Award	17
	2. The Settlement In This Case Warrants Attorney Fees	19
	3. The Direction for Amount of Attorney Fees or Remand	23
V.	Conclusion	24
	Statement of Related Causes	24
	Proof of Service	25

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, Plaintiffs/Appellants, vs. JOHN V. EVANS, MILTON G. KLEIN, JERRY EVANS, GEORGE EACHIK and CARROLL ELMORE, individually and in their official capacities. Their Successors to Office, Title and Interest, Defendants/Appellees.	Ninth Cir. No. 83-3839 Dist. Case No. CIV 80-4091 CERTIFICATION REQUIRED BY NINTH CIRCUIT COURT OF APPEALS RULE 13(b) (3)

The undersigned, counsel of record for Appellants certifies that the following listed parties have an interest in the outcome of this case: the named and Class Plaintiffs; Idaho Legal Aid Services; Charles Johnson, Johnson Olson Robison, Chartered; The State of Idahn. These representations are made to enable judges of the Court to evaluate possible disqualification or recusal.

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Legal Aid Project
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I. TABLE OF AUTHORITIES

Cases

	Page
In re Armored Car Antitrust Litigation 472 F. Supp. 1357, 1367 (N.D. Ga. 1979).	18
Association for Retarded Citizens vs. State of Florida (Jan.-Feb. Mental Disability Law Reporter) 7 M.D.L.R. 62.	10
Aware Woman Clinic, Inc. v. Cocoa Beach, Florida 629 F. 2d 1146 (5th Cir. 1980)	22
Bradley v. Richmond School Board (1974) 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed. 2d 476	8, 20
Brewster v. Dukakis (D.C. Mass., 1981) Civil Case No. 78-4423-F 50 Law Week 2235 (10-20-81).	10
Burt v. Abel 585 F.2d 613 (4th Cir. 1978).	22
Coop v. South Bend 635 F.2d 652 (7th Cir. 1980)	22
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Dennis v. Chang 611 F.2d 1302, 1306 (9th Cir. 1980)	9, 10, 24
Entertainment Concepts, Inc. v. Maciejewski 631 F.2d 497 (7th Cir. 1980)	22

Fountilla v. Carter
571 F.2d 487, 496 (9th Cir. 1978) 24

Gates v. Collier
616 F.2d 1268, 1275 (5th Cir. 1980) 23

Grunin v. International House of Pancakes
513 F.2d 114, 128 (8th Cir. 1975) 17

Hall v. Cole
412 U.S. 1 (1973, quoting 462 F.2d 777,
780-81 (2d Cir. 1972) 8, 10

Hutto v. Finney
437 U.S. 678 (1978) 11, 21

International Oceanic Enterprises, Inc. v. Menton
614 F. 2d 502 (5th Cir. 1980) 21

Jamison v. Butcher and Sherrerd
68 F.R.D. 479 (E.D. Pa. 1975) 14

Johnson v. Georgia Highway Express, Inc.
488 F.2d 714 (5th Cir, 1974) 24

Johnson v. Mississippi
606 F.2d 635 (5th Cir. 1979) 21

Kerr v. Screen Extras Guild, Inc.
526 F.2d 67, 70 (9th Cir. 1975) 24

Kinq Resources Co. Security Litigation
420 F. Supp. 610, 638 (D. Colo. 1976) 17

Konczak v. Tyrrell
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cert. denied, 444 U.S. 1016 (1980) 22

Leeds vs. Watson
630 F.2d 674, 677 (9th Cir. 1980) 9, 21, 23

Maher v. Ganne
448 U.S. 122 20

McDonald v. Chicago Milwaukee Corporation
565 F.2d 416 (7th Cir. 1977) 14

Mendoza v. United States
623 F.2d 1338 (9th Cir. 1980) 12, 14, 16

Merola v. Atlantic Richfield Co.
493 F.2d 292 (3d Cir. 1974)(Merola I) 17

Merola v. Atlantic Richfield Co.
515 F.2d 165 (3d Cir. 1975)(Merola II) 17

New York Gaslight Club, Inc. v. Carey
447 U.S. 54, 70 n.9 (1980) 21

Norman v. McKee
290 F. Supp. 29 (N.D. Cal. 1968),
aff'd, 431 F.2d 769 (9th Cir. 1970) 14

Obin v. District Number Nine of I.A.M.A.W.
651 F.2d 574, 583 (8th Cir. 1980) 14, 19

Perez v. University of Puerto Rico
600 F.2d 1 (1st Cir 1979) 16

Prandini v. National Tea Co.
557 F.2d 1015, 1021 (3d Cir. 1977) 12, 13, 14, 17

Riddell v. National Democratic Party
624 F.2d 539 (5th Cir. 1980) 22

Sharrock v. Harris
489 F. Supp. 913 (S.D.N.Y. 1980) 22

Sprague v. Ticonic National Bank
307 U.S. 161, 59 S.Ct. 777, 83 L.Ed
1184 (1939) 10, 19

Stanford Daily v. Zurcher
64 F.R.D. 680 (N.D. Cal. 1974) 24

Staton v. Housing Auth. of Pittsburg
638 F.2d 599 (3d Cir. 1980) 22

Swann v. Charlotte-Mecklenberg
Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975) 24

Toledo Scale Co. vs. Computing Scale Co.
261 U.S. 399, 1923) 10

Universal Amusement Co. v. Hofheinz
616 F.2d 202, 205 (5th Cir. 1980) 23

Vaughn v. Atkinson
369 U.S. 527 (1962) 11

White v. New Hampshire Dept.
of Empl. Sec.
455 U.S. 445, 71 L Ed 2d 325,
102 S Ct 1162 (1982) 18

Federal Statutes

28 USC §1331 1
42 USC §1983 1
42 USC §1988 1, 6, 7, 18, 25

Federal Rule of Civil Procedure

Rule 23 17
Rule 23(e) 15
Rule 54(c) 16
Rule 59(e) 18

Local Ninth Circuit Rules

Rule 13(b) 1

Texts

S. REP. NO. 94-1011, 94th Cong., 2d Sess.,
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& AD NEWS 5910 7, 8, 20

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2d Sess., 7 (1976) 25

Treatise of the N.Y. City Bar,
50 Law Week 2204-2205 4

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, Plaintiffs/Appellants, vs. JOHN V. EVANS, MILTON G. KLEIN, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities. Their Successors to Office, Title and Interest, Defendants/Appellees.	Ninth Cir. No. 83-3639 Dist. Case No. CIV 80-4091 CERTIFICATION REQUIRED BY NINTH CIRCUIT COURT OF APPEALS RULE 13(b) (3)

The undersigned, counsel of record for Appellants certifies that the following listed parties have an interest in the outcome of this case: the named and Class Plaintiffs; Idaho Legal Aid Services; Charles Johnson, Johnson Olson Robison, Chartered; The State of Idaho. These representations are made to enable judges of the Court to evaluate possible disqualification or recusal.

Charles Johnson, XXX
Legal Aid Project
Johnson Olson Robison, Chartered
P. O. Box 1708
Pocatello, Idaho 83201

II. STATEMENT OF THE CASE; NATURE OF THE CASE, COURSE OF PROCEEDINGS BELOW; and FACTS.

A. JURISDICTION AND TIMELINESS LOCAL RULE 13(b) STATEMENT

The basis for subject matter jurisdiction was grounded on federal questions both under 28 USC §1331, as arising "under the Constitution, laws, or treaties of the United States," and 28 USC §1343, civil rights; and, in relation to the federal question the doctrine of pendent jurisdiction was relied on as to state law counts. Defendents have referred to the "First, Fifth and Fourteenth Amendments to the Constitution of the United States of America" as well as 42 USC §§1983 and 1988.

The appeal was timely filed.

The Order is properly appealable. The Order and Judgment appealed from finally disposed of all attorney fee claims with respect to all parties.

Judgement denying attorney fees was entered May 6, 1983. The Notice of Appeal was filed within thirty days, having been filed on May 23, 1983.

No attorneys fees were awarded to any party below, and are sought by plaintiff on appeal.

B. Nature of the Case

This action challenged the placement by the defendant State of Idaho of emotionally disabled children of both sexes

(as young as age 11), on the same units as adult psychiatric patients, including child molesters. Further, the total failure to provice any appropriate specialized treatment, the failure to provide any education at all (special or otherwise), and the failure to provide specialized staff and other services for said children in the setting least restrictive of personal liberty was challenged.

The parties to this matter, by and through their respective counsel, have engaged in years of trial preparation, work and negotiation, which is on file with the Court. The defendants proposed a "Stipulation Settling Mental Health Claims and Order" (stipulation, hereinafter) at a pre-trial conference one week prior to trial, which stipulation is on file with the Court.

The parties stipulated to the entry of the declaration of the basic rights the plaintiffs prayed for in their complaint. Further, the stipulation provides minimally acrquate protection, training and mental health treatment for the plaintiff class. The stipulation is a dramatic improvement over past practices and is designed to prevent the problems complained of herein from re-occurring.

C. Courts of Reconsideration Below

The defendants proposed the stipulation with the provision that Plaintiffs were forced to waive their costs and

attorney fees; which plaintiffs found unacceptable on ethical grounds. Hence, by interlineation, the parties stipulated, at the settlement hearing in this matter (held in Pocatello, on March 22, 1983), to a change in paragraph II (25) of the stipulation, as follows:

> 25. Plaintiffs and defendants shall each bear their own costs and attorneys fees thus far incurred, if so approved by the Court. (The change agreed to by counsel has been highlighted. See Transcript page 6.)

The reason for this change is that counsel for plaintiffs maintained that any discussion of costs and attorney fees (collectively costs hereinafter) was unethical and improper. Hence, the stipulation was approved on the merits, while withholding for future consideration the matter of costs.

Counsel for the parties agreed at the hearing that the matter of the propriety (and ethics) of negotiating the merits and costs simultaneously should be addressed by the Court. The defendant's counsel then stated that he would tender the Stipulation, conditional on the Court's approval of this cost's issue. Counsel for the defendants then stated that if the negotiation of costs and merits simultaneously is proper, that the settlement should stand.

The plaintiff's subsequently filed a Motion for Consideration of Costs and Attorneys Fees on Settlement, which

advocated approval of the settlement with no provision on the waiver of attorney fees, so that plaintiffs could present their cost bill with (attorney fees) for consideration by the Court. The defendants filed a Brief advocating approval of the "Stipulation Settling Mental Health Claims and Order", with waiver of all attorney fees and costs.

The Federal District Court in Idaho approved the "Stipulation Settling Mental Health Claims and Order" on or about April 28, 1983. Subsequently, on May 6, 1983, the Court issued an "Order Denying all Costs" in this matter.

The plaintiffs filed a Notice of Appeal from the Order Denying All Costs on May 23, 1983. The appeal of the Order Denying all Costs is presently pending before this Court.

On May 31, 1983, the defendants filed a "Motion to Suspend Performance of Stipulation Pending Appeal". This document listed no rules upon which the "Motion to Suspend Performance of Stipulation Pending Appeal" was based. Moreover, the only grounds for the motion are that the defendants seek to preserve the bargaining position of the parties on the waiver of attorney fees.

The Federal District Court of Idaho granted the "Motion to Suspend Performance of Stipulation Pending Appeal" by Order dated August 10, 1983. Plaintiffs then filed a "Motion for Relief from the Stay" created by the "Motion to

Suspend Performance of Stipulation Pending Appeal" on or about August 26, 1983. This was denied by the District Court.

The plaintiffs then moved for relief in this court. This Court then entered an order granting Appellant's Motion for Stay or Injunction Pending Appeal and ordered the parties to comply with the stipulation.

The court should note that four children have been placed with adults in Idaho facilities since the entry of the Stipulation. These youth allegedly are placed in compliance with the Stipulation for a variety of reasons, but the situation must be monitored.

A named plaintiff and primary witness in this case, Paula E., who resided at State Hospital South for seven years (from about age 13 to age 20) was released in June, 1983, by defendants and placed at the "Y Motel" in Blackfoot, Idaho (an allegedly inappropriate placement). Three weeks later she was dead; runover by a car.

These harms were lessened or prevented by this Court's enforcement of the "Stipulation Settling Mental Health Claims and Order". Indeed, enforcement of the Stipulation is critical to class plaintiffs.

This case was originally litigated by counsel for the plaintiff under a special advocacy grant from the National Institute of Mental Health to Idaho Legal Aid. That grant has

since expired, and counsel for plaintiffs has endeavored to litigate this matter in private practice, with some assistance from Idaho Legal Aid.

III. ISSUES PRESENTED

There are two major issues in this case.

First, whether it is improper for defense counsel to raise the issue of, and require, the waiver of costs and attorney fees as part of a final settlement on the merits of a class action for declaratory and injunctive relief.

The second issue on appeal is whether plaintiffs are entitled to costs, including a reasonable attorney fee, in this action pursuant to federal law including 42 U.S.C. §1988.

IV. ARGUMENT

A. AUTHORITY FOR ATTORNEY FEES

The statutory authority for an award of attorney fees in this matter is found in the civil rights statute, 42 U.S.C. §1988. This statute provides that in any civil action or proceeding to enforce the civil rights statutes or the U.S. Constitution, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs." The plaintiffs specifically prayed for such costs and attorney fees in their complaint.

Support for plaintiffs position can be easily found in

the legislative history of the act (42 U.S.C. §1988) in which Congress emphasized that "[t]he remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven."[1/] Congress specially recognized that attorneys' fee awards to private litigants was one of the "most effective remedies available to achieve the goals of our civil rights laws." [2/] Furthermore, Congress stated that: "if our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases."[3/] To the extent that the negotiation of costs and merits force plaintiffs and their counsel to involuntarily waive their right to fee awards, such conduct violates the spirit and letter of the act.

The Act further reflects Congress' intent to effectuate and encourage private enforcement of the civil rights laws by authorizing the awarding of attorney fees to prevailing parties in civil rights actions.

1/ S. REP. NO. 94-1011, 94th Cong., 2d Sess., reprinted in [1976] U.S. CODE CONG. & AD NEWS 5910.

2/ ID at 5911

3/ ID at 5913

"The purpose and effect of S. 2278 are simple--it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866...All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."

"Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose.***Without counsel fees the grant of Federal jurisdiction is but an empty gesture***. Hall v. Cole, 412 U.S. 1 (1973, quoting 462 F.2d 777, 780-81 (2d Cir. 1972)." Senate Report 94-1011, 5 U.S. Code Cong. and Admin. News at 5909-10 (1976).

Congress was particularly concerned with the plight of persons financially unable to vindicate violations of their constitutional rights.

"In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." Senate Report 94-1011, supra at 5910. (Emphasis added)

* * *

These fee shifting provisions have been successful in enabling vigorous enforcement

> of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy.

As the Ninth Circuit recently commented, in Dennis v. Chang, 611 F.2d 1302, 1308 (9th Cir. 1980), affirming a fee award of fees to the Legal Aid Society of Hawaii ("LASH") in four cases successfully challenging the administration of Hawaii's Medicaid and AFDC programs:

> Even when funded by the State, legal services organizations operate on limited budgets and must allocate their resources among competing projects. Fee awards in civil rights cases encourage legal services organizations to pursue such litigation because the awards permit replenishment of the funds available for the organization's work. While LASH has a present program commitment to civil rights litigation, that commitment is not immutable. Continuation of the commitment is made more attractive by the prospect of recouping resources devoted to such suits. Moreover, attorneys' fees awards will allow LASH to expand it efforts to enforce civil rights statutes in accordance with it commitment.

This result was affirmed in Leeds v. Watson, 630 F.2d 674, 677 (9th Cir. 1980).

It should be noted that all costs awarded to the Plaintiffs are paid directly to Idaho Legal Aid Services, Inc., and thereby enable it to replenish the limited funds which are available to the program to represent these same plaintiff/appellants in the implementation of this consent decree. See Dennis v. Chiang, supra.

More recently, the U.S. District Court in Massachusetts decided that a class of persons institutionalized in a state mental hospital has the right to independent legal assistance in order to ensure protection of their rights. Brewster v. Dukakis, (D.C. Mass., 1981) Civil Case No. 76-4423-F, 50 Law Week 2235 (10-20-81). Judge Freedman found that the state was required to fund this advocacy system based on three (3) considerations. First, if the state does not assume responsibility for this system, there will be none. Second, the cost is not great (though the judge sympathized with the state's fiscal problems). Third, such a system is a necessity for these individuals who will otherwise suffer chronic and substantial deprivations of their rights. Another case reached a similar result on the basis that plaintiffs were "prevailing parties" and entitled to attorney fees. Association for Retarded Citizens vs. State of Florida. (Jan.-Feb. Mental Disability Law Reporter) 7 M.D.L.R. 62.

Thus, an award of attorney fees will provide a common fund to protect plaintiff/appellants. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, (1939), Hall v. Cole, 412 U.S. 1, (1973). Thereby, compliance with the Court stipulation may be assured. Toledo Scale Co. vs. Computing Scale Co., 261 U.S. 399,

(1923)[4]

Therefore, an award of costs in general is proper, and in this situation, especially appropriate. Without adequate advocacy resources the plaintiffs may face a bleak future where they do little more than exist, with no specialized treatment, on adult psychiatric units with child molesters.

In this case, before Idaho Legal Aid obtained a special grant to litigate mental health issues, plaintiffs of both sexes as young as age 11 were placed with all other adult psychiatric patients in Idaho (including child molesters) without any education or specialized treatment. This case has been settled and this situation does not exist anymore.

However, the special grant to litigate these issues has been terminated. Counsel for the plaintiff class is now in private practice attempting to litigate these and other issues with partial assistance from Idaho Legal Aid. Obviously, the necessity of fees in this situation -- as evidenced by this brief -- is poignantly obvious.

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[4] Defendant's lack of good faith in prolonging the litigation and increasing plaintiffs costs in this matter may also be questioned. Vaughn v. Atkinson, 367 U.S. 527 (1962); Hutto v. Finney, 437 U.S. 678 (1978).

potential conflict disappears simply because there is no fund or money damages being negotiated. Financial consequences of injunctive relief are a significant consideration to the institution negotiating a remedy, and the potential conflict[5/] between class counsel and the members of the class remains.[6/]

Whether the existence of the potential conflict requires a trial court to reject a settlement proposal depends upon the circumstances of each case. The presence of simultaneously negotiated attorneys' fees should cause the court to examine with special scrutiny the benefits negotiated for the class. It would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiations took place. But rejection of a settlement is not automatically required in such cases -- there may be circumstances present which appear to neutralize the potential for impropriety. Such a judgment is appropriately within the sound discretion of the trial judge who can be sensitive to the dynamics of the situation. Thus, while we strongly discourage the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations, accord, Prandini,

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5/ We do acknowledge, however, that the danger of impropriety may not be as great here as when there is one fund from which both the class award and the attorneys' fees are to be apportioned. In such a case, where the defendant is indifferent as to the allocation, the conflict is more direct. These are appropriate circumstances for the District Court to take into account. (Footnote from text).

6/ We do not make any findings that there were in fact improprieties in the negotiation of this settlement. However, "[t]he court does have the duty to see to it that the administration of justice has the appearance of propriety as well as being so in fact." Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977). (Footnote from text)

557 F.2d at 1021, we do not believe rejection of a resulting settlement in every case is appropriate.

In Mendoza v. U.S., the court approved the settlement; which provided declaratory/injunctive relief and provided attorney fees, in spite of an allegation of an unfair compromise to some class plaintiffs on the merits. There is no allegation that the settlement is unfair to the plaintiffs in the instant case on the merits and so the settlement on the merits should be approved. However, there is a dispute on the improper forced waiver of attorney fees, which waiver should not be approved.

A similar result has been reached in another case approved by the ninth circuit. Norman v. McKee, 290 F. Supp. 29 (N.D. Cal. 1968), aff'd, 431 F.2d 767 (9th Cir. 1970). Cases from other jurisdictions have held that negotiations on the merits must be separate from negotiations on fees. Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977); Obin v. District Number Nine of I.A.M.A.W., 651 F.2d 574, 583 (8th Cir. 1980); Jamison v. Butcher and Sherrerd, 68 F.R.D. 479 (E.D. Pa. 1975); McDonald v. Chicago Milwaukee Corporation, 565 F.2d 416 (7th Cir. 1977).

The reasons for not permitting the simultaneous negotiation of the merits and fees is best summarized by the Opinion of the N.Y. City Bar Association, 50 Law Week 2204-2205. In its opinion, the Bar recognized that a forced waiver of attorney fees will place attorneys representing

indigent plaintiffs in declaratory/injunctive cases in an ethical conflict.

This conflict arises from defendants ability to propose a settlement which is clearly in the best interest of the class plaintiffs, which the attorney must ethicly accept. Under Disciplinary Rule Cannons 6 and 7, a lawyer must represent a client competently and zealously within the bounds of the law. Moreover, under Cannon 5, an attorney must exercise independant professional judgment on behalf of a client and must not acquire an interest in the litigation.

Yet attorneys, like all persons, must be paid for their services. If attorneys are not paid, these cases will not be litigated at all.

Thus, forced fee waiver will also defeat the purpose of attorney fee statutes and allow defendant's to exploit the plaintiffs conflict, to the defendant's advantage. The problem created by simultaneous settlement negotiations of the merits and attorneys' fees is the dilemma faced by plaintiffs' counsel in the lawyer's self-interest in maximizing the fee award as opposed to the duty to maximize the benefit for the client. Potential for the dilemma is created whenever defense lawyers offer a lump sum monetary settlement (plaintiff's damage or back pay claims, as well as attorneys' fees), or in connection with non-monetary relief where defense counsel conditions an

offer on the merits with an offer on fees. Obviously, the form and conditions of these settlement practices by defense counsel vary greatly. Where no money is involved, such offers create an insuperable dilemma for civil rights plaintiffs and their counsel by driving a wedge between them and creating a conflict of interest for plaintiffs' counsel.

In this case the wedge was dramatic and real; plaintiffs counsel was under clear instructions not to waive any fees which had been advanced by Idaho Legal Aid. The plaintiffs counsel was in the midst of trial preparations (briefing, issuing subpoenas, arranging accomodations for out of state experts, etc.) when, at the pre-trial conference, less than one week before trial, the defendant, State of Idaho, proposed a settlement that was not only clearly in the best interest of plaintiffs, but was better than the Federal District Judge in the case had implied he would have ordered. However, the settlement also required the forced waiver of all fees. Legal Aid would not yield, neither would the State. Plaintiff's counsel was placed in a severe ethical bind.

As a last effort, plaintiff's counsel proposed that the settlemet he approved with the fee waiver "if so ordered by the Court." In this way the plaintiff's counsel obtained the settlement on the merits, which he was ethically bound to accept, and which provided immediate relief without the

necessity of an appeal from a trial at which an uncertain factual record would have developed (incidently, saving costs of further preparation and trial costs). However, the propriety of the attorney fees waiver -- which plaintiff's counsel was contractually and ethicly bound not to accept - could be litigated later. If nothing else, this matter should be decided to obviate this dilemma for, and encourage, future would-be litigants in this area (of which there are few in Idaho).

C. PROCEDURE IN THIS CASE

1. Approval of the Settlement Without the Fee Waiver.

Recently many federal courts have held that a negotiated fee will not be automatically approved. The court will instead determine whether the fee is justified by applying the usual standards for setting a fee award. Prandini v. National Tea Co., supra, at 1018-19; Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975)(Merola II); Grunin v. International House of Pancakes, 513 F.2d 114, 128 (8th Cir. 1975); Merola v. Atlantic Richfield Co., 493 F.2d 292 (3d Cir. 1974)(Merola I); In re King Resources Co. Security Litigation, 420 F. Supp. 610, 628 (D. Colo. 1976).

This is reflected in Federal Rule of Civil Procedure 23 and its mandate that the federal district court approve of all compromises or dismissals of class actions. Under Rule

23(e), the court has very wide discretion to assure itself that all aspects of the settlement proposal are fair to the named and unnamed parties. Indeed the court's role under Rule 23(e) has been described as an "overseer" of the rights of unnamed passive members of the class. In re Armored Car Antitrust Litigation, 472 F. Supp. 1357, 1367 (N.D. Ga. 1979).

In any case, the settlement in this case on the merits should stand. Other than the waiver of attorney fees, the settlement in this case presents a fair compromise of a disputed claim. Mendoza v. United States, supra, at 1353.

This conclusion finds support in the Supreme Court's discussion of attorney's fees in White v. New Hampshire Dept. of Empl. Sec., 455 US 445, 71 L Ed 2d 325, 102 S Ct 1162 (1982). In this case, the Court considered the power of a court to award counsel fees under 42 U.S.C. §1988 pursuant to an application that had been filed several months after entry of a consent decree on the merits of the case. The district court had determined that the application was proper, but the circuit court held the application untimely under F.R.C.P. 59(e), which permitted amendment of a final decree only upon a motion filed within ten days of the time in which the decree was entered. The Supreme Court, however, squarely rejected this argument at 455 U.S. 454; and awarded attorney fees:

> Section 1988 authorizes the award of

> attorneys' fees "in [the] discretion" of the court. We believe that this discretion will support a denial of fees in cases in which a postjudgment motion unfairly surprises or prejudices the affected party. Moreover, the district courts remain free to adopt local rules establishing timeliness standards for the filing of claims for attorney's fees. And of course the district courts generally can avoid piecemeal appeals by promptly hearing and deciding claims for attorneys' fees. Such practice normally will permit appeals from fee awards to be considered together with any appeal from a final judgment on the merits.

Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed 1184 (1939). See also Obin v. Dist. No. 9 of Intern. Assn., etc., 651 F.2d 574, 582 (7th Cir. 1981), "motion for attorney fees collater and independant...from merits" of lawsuit.

2. The Settlement in this Case Warrants Attorney fees

A plaintiff who prevails at least in part on a substantive issue of some importance is entitled to fees. The Senate Report provided the clearest statement of the appropriate test:

> [Fee] awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without

formally obtaining relief.[7]

A plaintiff who prevails in part through settlement is entitled to fees under the law. Maher v. Gagne, 448 U.S. 122 (1980). In this case the Supreme Court affirmed the prevailing party status of a plaintiff who, "while not prevailing 'in every particular'" nonetheless obtained through a consent decree "'substantially all of the relief originally sought in her complaint'" 448 U.S. 129-130 The court, in Bradley v. Richmond School Board (1974) 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed. 2d 476, confronted a District Court which had awarded attorney fees in a school desegregation case to one whom, it was at least arguable, was not a "prevailing party" and where there was not a "final order" pending. The court, without dissent, said, at 416 U.S. 723:

> (These cases) can be expected to involve relief of an injunctive nature that must prove its efficacy only over a period of time and often with frequent modification ... To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel... A district court must have discretion to award attorney fees and costs incident to the final disposition of interim matters.

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7 S. Rep. No 94-1011, 94th Cong., 2d Sess., 5 (1976). See also H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976)

The Supreme Court has expressly held that a district court may make an award of costs, Id. at 724, of the kind contemplated herein.

This court adopted these principles in Leeds v. Watsen, supra, 630 F. 2d at 677: "Although the Act permits the court to exercise its discretion as to whether to award attorney fees, such fees should be awarded to a litigant who furthers the interest of a significant class of persons by effectuating congressional purposes of a high priority. (Citations ommitted). The successful plaintiff in this type of claim, then, should ordinarily be entitled to attorney fees unless special circumstances would render such an award unjust."

Three of the most often asserted special circumstances for denial of fees have been soundly rejected by the Supreme Court; neither a defendant's good faith,[8] the enactment of a new fee-shifting statute, [9] nor the free representation of a plaintiff by a public interest organization[10] constitutes a

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8 Hutto v. Finney, 437 U.S. 678 (1978). Similarly, an allegation by government defendants that they were duty-bound to defend a challenged statute is not a special circumstance. See, e.g., International Oceanic Enterprises, Inc. v. Preston, 614 F. 2d 502 (5th Cir. 1980), Johnson v. Mississippi, 606 F.2d 635 (5th Cir. 1979)

9 Hutto v. Finney, 437 U.S. 678 (1978)

10 New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980)

special circumstance which would render an award of fees unjust. Dozens of other alleged special circumstances have also been routinely rejected by the courts. For example, it is not a special circumstance

> that the litigation benefited only named plaintiffs or affected only private rights rather than a larger public or public rights; [11]
>
> that plaintiffs won minor damages or only nominal damages; [12]
>
> that plantiff's case was simple; [13]
>
> that the government entity held liable is not in the best financial condition or is running a deficit; [14]
>
> that the fees would be paid through tax revenues collected from current taxpayers rather than from former taxpayers who were around when the challenged law was enacted; [15] or

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11 Konczak v. Tyrrell, 603 F.2d 13 (7th Cir. 1979), cert. denied, 444 U.S. 1016 (1980); Perez v. University of Puerto Rico, 600 F.2d 1 (1st Cir 1979)

12 Coop v. South Bend, 635 F.2d 652 (7th Cir. 1980); Burt v. Abel, 585 F.2d 613 (4th Cir. 1978).

13 Staten v. Housing Auth. of Pittsburg, 638 F.2d 599 (3d Cir. 1980)

14 Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980); Sharrock v. Harris, 489 F. Supp. 913 (S.D.N.Y. 1980)

15 Aware Woman Clinic, Inc. v. Cocoa Beach, Florida, 629 F. 2d 1146 (5th Cir. 1980); Riddell v. National Democratic Party, 624 F.2d 539 (5th Cir. 1980).

> that a substantial portion of the fee request is for time spent on the fee issue itself.[16]

In view of the fact that so many defense arguments have now been rejected, some courts are summarily concluding in the cases before them that there simply are no special circumstances for denial of fees[17]. Other courts have recognized that, as a general matter, prevailing plaintiffs are entitled to fees "almost as a matter of course."[18] Leeds v. Watson, supra.

3. The direction for Amount of Attorney Fees on Remand

Regardless of the method of computation that is followed, there remain dozens of issues affecting compensable hours, reasonable hourly rates, the contingency factors, and the quality factors. Many of these issues were addressed in summary fashion in a single paragraph in the Senate Report:

> It is intended that the amount of fees awarded under [the Fees Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be

---

16 Criterion Club of Albany v. Board of Comm'rs, 594 F.2d 118 (5th Cir. 1979).

17 See, e.g., Universal Amusement Co. v. Hofheinz, 616 F.2d 202, 205 (5th Cir. 1980).

18 Gates v. Collier, 616 F.2d 1268, 1275 (5th Cir. 1980); Davis v. Murphy, 587 F. 2d 362, 364, (7th Cir. 1978).

nonpecuniary in nature. The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenberg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." Davis, supra; Stanford Daily, supra, at 684. S. Rep. No. 94-1011, 94th Cong. 2d Sess., 6 (1976).

The standard for determing the proper amount of attorney fees to be awarded a prevailing party has been set forth in numerous court decisions. Hensley v. Eckerhart, ___ U.S. ___, 51 Law Week 4552 (5/17/83). See Dennis v. Chiang, supra. The Ninth Circuit Court of Appeals has adopted the twelve standards enunciated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Fountilla v. Carter, 571 F.2d 467, 496 (9th Cir. 1978); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

The court should remand this matter with directions to allow attorney fees under the standards in the above cases. This will prevent future litigation of this matter.

V. CONCLUSION

The defendants actions in this case placed children

with adult mental patients (including child molesters), without any specialized education or child psychiatric programs. This problem has been alleviated.

The defendant State of Idaho had already advocated vociferously for approval of this settlement on the merits. And, the defendant, State of Idaho, only sought to vacate the "Stipulation Settling Mental Health Claims" in order to force plaintiffs to waive their attorney fees in exchange for a settlement on the merits.

The purpose of the Attorney Fees Act (42 U.S.C. §1988) will only be served by an award of fees in this matter. Otherwise, the plaintiffs will be at the mercy of the defendants and subject to a return of past practices.

WHEREFORE, the plaintiffs move the above entitled Court to (1) approve and enforce the "Stipulation Settling Mental Health Claims and Order"; (2) grant plaintiff/-appellants their attorney fees and costs, in the District Court and on appeal.

DATED this 23 day of November, 1983

Charles Johnson, III
JOHNSON OLSON ROBISON, CHARTERED
303 Spaulding Building
Pocatello, Idaho 83204

STATEMENT OF RELATED CASES

There are no known related cases, other than issues treated in the Ninth Circuit cases cited in this brief.

Charles Johnson, III

CERTIFICATE OF MAILING

I CERTIFY that I mailed a true and correct copy of the foregoing to the attorney of record herein, by placing same in the United States mail, postage prepaid, addressed as follows:

James Wickham, Esquire
Deputy Attorney General
Health and Welfare Division
450 W. State, 7th Floor
Boise, Idaho 83720

Thomas C. Frost
Deputy Attorney General
Health and Welfare Division
450 W. State, 7th Floor
Boise, Idaho 83720

on this ___ day of November, 1983.

Licensed Lawyer

Supreme Court, U.S.
FILED
APR 11 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1288

In The
Supreme Court of the United States
October Term, 1984

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK, and WILLIAM GRUZINSKI,

Petitioners,

vs.

JEFF D., PAULA E., JOHN M. and DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

James Thomas Jones
Attorney General
State of Idaho
Statehouse
Boise, Idaho 83720
(208) 334-2400

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

Counsel for Respondents makes one mischaracterization of facts which permeates the Brief in Opposition to Petition for Writ of Certiorari. On page 2 of said Brief in Opposition it is stated:

> There is nothing in the record to support Petitioners' contention that there was a separate stipulation 'that the settlement was to be tendered to the District Court for approval only if it concluded the practice [of requiring a waiver of fees as a condition of settlement] was ethical.' Brief in Opposition, p. 2.

The separate stipulation by which the settlement was conditionally submitted to the District Court for approval was oral and due to the death of the court reporter, a transcript of the hearing is unavailable. However, Respondents' brief in the Court of Appeals, appended as an exhibit to the Brief in Opposition, correctly reflects the events of the hearing:

> Counsel for the parties agreed that the matter of the propriety (and ethics) of negotiating the merits and costs simultaneously should be addressed by the Court. The defendant's [sic] counsel then stated that he would tender the [settlement] Stipulation, conditional on the Court's approval of this cost's [sic] issue. Appellee's Brief, p. 3; Exhibit "A" to the Brief in Opposition.

Moreover, the separate stipulation is reflected in and served as the basis for the District Court's Order of August 10, 1983, suspending performance of the settlement pending appeal. According to that Order the parties "further stipulated that should the [District] Court conclude that it is ethical for attorneys admitted before this Court to negotiate a waiver of attorneys fees and costs concurrently with the merits of the claims that the [settlement] stipulation would be tendered for consideration by the

Court . . .". Appendix to Petition for Writ of Certiorari, p. 16a. The separate stipulation is also reflected in the Opinion of the Court of Appeals. *Jeff D. v. Evans,* 743 F.2d 648, 650 (9th Cir., 1984).

The point is: if attorney's fees and costs had not been waived, Petitioners would not have agreed to settle the case on the terms tendered, the "settlement" would not have been tendered to the District Court for approval, and the case might have been litigated at trial.

Petitioners pray that a Writ of Certiorari be issued.

Respectfully submitted this 10 day of April, 1985.

/s/ James Thomas Jones
Attorney General
State of Idaho
Statehouse
Boise, Idaho 83720
(208) 334-2400

Counsel for Petitioner

Office - Supreme Court, U.S.
FILED
JUN 28 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1288

In The

Supreme Court of the United States

October Term, 1984

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK and WILLIAM GRUZINSKI,

Petitioners,

v.

JEFF D., PAULA E., JOHN M. and DUSTY R., Minors, By and Through Their Next Friend, CHARLES JOHNSON, III, Individually and on Behalf of the Class They Represent and MARK CLARY, Intervenor,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed February 12, 1985
Certiorari Granted May 13, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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TABLE OF CONTENTS

		Page
1.	Relevant Docket Entries.	1
2.	Complaint (8/4/80).	4
3.	District Court's Order Appointing Charles Johnson, III, As Next Friend Of Plaintiff (8/4/80).	32
4.	Answer (9/29/80).	34
5.	Stipulation In Settlement Of Claims Against Education Defendants And For Provision Of Education Services. Order (10/19/81).	45
6.	Order Granting Defendant's Motion For Summary Judgment As To Duty Of Providing Additional Facilities And Denied Regarding Federal Constition And Idaho Code (7/26/82).	56
7.	Stipulation For Class Certification And Order (9/7/82).	58
8.	Defendants' Response To Requests For Admissions (10/7/82).	60
9.	Amended Answer (11/1/82).	82
10.	Plaintiff's Motion For Consideration Of Costs And Attorney's Fees On Settlement (4/4/83).	87
11.	Record Of Hearing In Which Plaintiff's Motion For Attorney's Fees Denied (4/28/83).	88
12.	Stipulation Settling Mental Health Claims (4/28/83).	95
13.	District Court's Order Denying All Costs (5/9/83).	106
14.	Plaintiff's Notice Of Appeal (5/26/83).	108
15.	Defendant's Motion To Suspend Performance Of Stipulation Pending Appeal (6/3/83).	109
16.	District Court's Order Suspending Stipulation Pending Appeal (8/12/83).	111

TABLE OF CONTENTS—Continued

Page

17. Plaintiff's Motion For Relief From District Court's Stay Order (8/29/83). 113

18. District Court's Order Denying Plaintiff's Motion For Relief From Stay (9/6/83). 114

19. Letter From Chief Judge Marion J. Callister To Charles Johnson, III (9/6/83). 115

20. Ninth Circuit's Order Granting Plaintiff's Emergency Motion For Stay Of Injunction Pending Appeal And Vacating District Court's Order Suspending The Parties' Stipulation Pending Appeal (9/26/83). 117

21. District Court's Order Tolling Defendant's Obligation To Respond To New And Pending Matters (10/22/84). 118

22. Ninth Circuit's Order Granting Plaintiff's Second Emergency Motion For Stay Of Injunction Pending Appeal (11/6/84). 119

RELEVANT DOCKET ENTRIES:

1. United States District Court (Idaho)

Date	*Proceedings*
8/ 4/80	Order granting leave to proceed in forma pauperis.
8/ 4/80	Complaint.
8/ 4/80	Order appointing Charles Johnson as next friend of plaintiff.
9/29/80	Answer.
2/ 2/81	Order granting motion to intervene (Mark Clary and Frank Clary).
10/19/81	Stipulation in settlement of claims against education defendants and for provision of education services. Order.
3/ 8/82	Notice of substitution of Charles Johnson, III and Howard A. Belodoff as counsel for plaintiff.
3/25/82	Motion for summary judgment by plaintiff.
5/ 3/82	Motion of defendants Klein, Bachik, and Elmore for summary judgment.
7/26/82	Memorandum Decision.
7/26/82	Order granting defendant's motion for summary judgment as to duty of providing additional facilities and denied regarding federal constitution and Idaho Code.
9/ 7/82	Stipulation for class certification. Order.
11/ 1/82	Amended answer.
3/22/83	Record of hearing. Proposed Stipulation Settling Mental Health Claims submitted by parties and taken under advisement. Trial vacated.
4/ 4/83	Motion of plaintiff for consideration of costs and attorney's fees on settlement.

4/28/83 Record of hearing. Motion for attorney's fees denied. Court signed Order accepting Stipulation Settling Mental Health Claims.

5/ 9/83 Order denying all costs.

5/26/83 Notice of appeal by plaintiffs.

6/ 3/83 Motion of defendants to suspend performance of Stipulation Settling Mental Health Claims pending appeal.

8/12/83 Order suspending Stipulation while on appeal.

8/29/83 Motion of plaintiffs for relief from stay order.

9/ 6/83 Order denying motion for relief from stay.

10/22/84 District Court's Order tolling defendants' obligation to respond to new and pending matters.

2. Ninth Circuit Court of Appeals.

9/19/83 Filed, Appellant's emergency motion for stay or injunction pending appeal.

9/26/83 Filed Order. Appellant's emergency motion for stay or injunction pending appeal is granted. The district court's order suspending the parties' Stipulation pending appeal is vacated. Pending the disposition of this appeal, the parties shall comply with their Stipulation.

3/18/84 Case argued and submitted to Judges Schroeder, Farris and Reinhardt.

9/20/84 Ordered, Opinion filed and judgment to be entered.

10/ 4/84 Filed, Appellee's petition for rehearing and suggestion of rehearing en banc.

10/ 5/84 Filed, Appellant's request for award of attorney's fees on appeal.

10/26/84	Filed, Appellant's second emergency motion for stay or injunction pending appeal.
11/ 6/84	Filed Order. The appellant's second emergency motion for stay of injunction pending appeal is granted. The district court's order of 10/22/84, is vacated. The parties shall comply with their Stipulation Settling Mental Health Claims.
11/19/84	Received, Appellee's second petition for rehearing and suggestion for rehearing en banc.
11/21/84	Filed Order. The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.
11/28/84	Filed, Appellee's motion for stay of mandate.
11/29/84	Mandate issued.
12/ 6/84	Filed Order. The mandate in this case has issued. The motion for stay and the second petition for rehearing and suggestion for rehearing en banc are both denied as moot.
12/11/84	Filed, Appellee's motion to recall mandate and renew motion to stay pending application for writ of certiorari.
1/14/85	Filed Order. The court has considered the appellee's motion to recall the mandate to stay its issuance pending application for writ of certiorari. It is ordered that the mandate be recalled and its issuance stayed, provided that the parties comply with their Stipulation.
2/21/85	Received from the United States Supreme Court, notice of filing of petition for writ of certiorari.
4/18/85	Filed Order. Appellant's motion for reasonable attorney's fees on appeal in the amount of $4,896.06 is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CIV. NO. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors, individually and on behalf of the class they represent, by and through their next friend, Charles Johnson,

Plaintiffs,

v.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho;

MILTON G. KLEIN, individually and in his official capacity as Director of the Idaho State Department of Health and Welfare;

JERRY EVANS, individually and in his official capacity as State Superintendent of Public Instruction of the Idaho State Department of Education;

GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as Directors of State Hospital South;

Their Successors to Office, Title and Interest,

Defendants.

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed August 4, 1980)

I. PRELIMINARY STATEMENT

1. This is a class action for Declaratory and Injunctive Relief on behalf of the named Plaintiffs and the class they represent consisting of all Idaho children under the age of twenty-one who now, or will in the future, suffer from emotional or mental handicaps and who are, or will

in the future, be institutionalized or otherwise placed in residential programs by Defendants. Plaintiffs and the class they represent seek relief from the Defendants' failure to provide adequate or appropriate treatment and educational programs in the least restrictive alternative setting in violation of the Plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution; Article I, Sections One, Thirteen and Eighteen, and Article X, Section One of the Constitution of the State of Idaho; the Community Mental Health Centers Act (42 U.S.C. § 2661); the Rehabilitation Act of 1973 (29 U.S.C. § 794); the Education for all Handicapped Children Act (20 U.S.C. § 1401); the Developmental Disability Assistance and Bill of Rights Act (42 U.S.C. § 6000); the Idaho State Education of the Handicapped and Others Unable to Attend School Statute (Idaho Code § 33-2001); the Idaho Youth Rehabilitation Act requiring detention facilities to segregate juveniles from those treated as adult offenders (Idaho Code § 16-1812(A) (1), with respect to those in the Plaintiff class who are housed at State Hospital South with those treated as adult offenders under Idaho Code §§ 18-200 et seq.).

2. Because of the acts, omissions and policies of the Defendants, and the combined effect of their failure to cooperate with each other, the Plaintiffs and the class they represent are denied those services necessary to insure Plaintiffs and the members of their class a reasonable chance for rehabilitation and integration into society as a whole. Due to the failure of the Defendants to provide appropriate mental health and educational services, many of these Plaintiffs are confined on adult psy-

chiatric wards or are confined to facilities in other states (including Texas) to the detriment of both themselves and society as a whole. These children and adolescents do not have available to them the continuum of appropriate mental health and educational services, including residential placements, which Defendants must provide pursuant to law. The named Plaintiffs and the class they seek to represent ask only that this Court order the Defendants to provide such minimally adequate mental health and educational services as to give Plaintiff Class a reasonable hope for rehabilitation in the least restrictive alternative setting.

II. JURISDICTION AND RELATED MATTERS

3. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3) and (4) for actions arising under 42 U.S.C. § 1983. Jurisdiction is conferred on this Court to hear the claims under the Education for all Handicapped Childrens Act (20 U.S.C. § 1401) by 20 U.S.C. § 1415(e) (3). Plaintiffs' action for declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure. Plaintiffs' action for injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure. Plaintiffs' claims under the Idaho Constitution and Statutes set out hereinafter are all state law claims which may properly be considered under this Court's exercise of pendent jurisdiction.

III. PLAINTIFFS

4. Plaintiff, Jeff D., is a seventeen-year-old resident and citizen of Bingham County, Idaho. He is currently being held against his will as an involuntary civil

patient at State Hospital South in Blackfoot, Bingham County, State of Idaho, a facility of the Idaho State Department of Health and Welfare.

5. Plaintiff, Paula E., is a seventeen-year old resident and citizen of Bingham County, Idaho. She is presently being held against her will as an involuntary patient at State Hospital South in Blackfoot, Bingham County, State of Idaho, a facility of the Idaho State Department of Health and Welfare.

6. Plaintiff, John M., is a fourteen-year-old resident and citizen of Idaho. He is currently being held against his will at the Devereaux Foundation, Texas Branch, in Victoria, Texas, a psychiatric facility on contract to the Idaho State Department of Health and Welfare.

7. Plaintiff, Dusty R., is a twelve-year-old resident and citizen of Ada County, Idaho. He was being held against his will at State Hospital South in Blackfoot, Bingham County, State of Idaho, until transferred to the Idaho Youth Ranch, and then to a group home in Boise, Idaho.

8. Charles Johnson is a citizen of Idaho and a resident of Bonneville County, Idaho. He sues on behalf of the above named children as next friend. Minor Plaintiffs omit their full names in order to protect their identities. It is Plaintiffs' belief that the use of their full names will subject them to public humiliation and embarrassment.

Defendants

9. Defendant, John V. Evans, is a citizen of the State of Idaho. He is the Governor of the State of Idaho and the ex officio Director of the Budget for the State. As Director of the Budget, Evans has extensive authority for

reviewing the budget requests of State agencies, determination of the budgetary needs of each State agency and for submission to the Idaho State Legislature of a proposed budget for all State agencies.

10. Defendant, Milton G. Klein, is the Director of the Idaho State Department of Health and Welfare. He has statutory responsibility for the administration of the Department of Health and Welfare and its Divisions. He has ultimate responsibility for the administration of the State's treatment and educational programs for children in the state who are committed to institutions on account of mental disabilities or delinquency. He is further empowered to issue such regulations and policies as are necessary to carry out the above statutory responsibilities.

11. Defendant, Jerry Evans, is the State Superintendent of Education in Idaho. In this capacity he is responsible for carrying out the educational programs developed and adopted by the Idaho State Department of Education. He is also responsible for planning, developing and monitoring the educational program in Idaho for the institutionalized children in Idaho, which includes the Plaintiffs and the class they represent.

12. Defendants, George Bachik and Carroll Elmore, M.D., are, respectively, the Administrative and Clinical Directors of State Hospital South in Blackfoot, Bingham County, State of Idaho, a facility of the Idaho State Department of Health and Welfare. In this capacity they are responsible for the custody, care and treatment of part of the Plaintiff class.

13. The Defendants are sued in their official capacities and at all times material to this action, they have

acted under color of state law, custom and usage of the State of the State of Idaho. The successors to office, title and interest to Defendants are also named as Defendants to this lawsuit.

IV. CLASS ACTION

14. Plaintiffs bring this action pursuant to Rule 23(b)(1) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all other Idaho youth under the age of twenty-one who are, or will be in the future, be involuntarily institutionalized or placed in residential programs; and for whom the Defendants have not provided appropriate treatment and educational programs in the least restrictive alternative setting. The class is composed of the following subclasses:

a. Those residing at State Hospital South in Blackfoot, Bingham County, State of Idaho.

b. Those residing inside or outside the State of Idaho, in facilities or institutions under contract to the Idaho State Department of Health and Welfare.

15. Upon information and belief, there are over 50 (fifty) handicapped children who come within the definition of the class. The members of the class are so numerous that joinder of all members is impractical. The predominant questions of law and fact are common to all members of the class, including the alleged policies and practices challenged in this action which Defendants apply consistently to similarly situated members of the class. The claims of the named Plaintiffs are typical of the claims of the class and the Plaintiffs will fairly and adequately protect the interests of the entire class. The declaratory and injunctive relief sought by the named

Plaintiffs is typical of the relief sought by all members of the class.

16. The prosecution of separate actions by or against individual members would create a risk of:

a. inconsistent or varying adjudications with respect to members of the individual class members which would establish incompatible standards of conduct for the party opposing the class; or

b. adjudications with respect to individual class members which would, as a practical matter, be dispositive of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

The Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

V. STATEMENT OF FACTS

Plaintiff Jeff D.

17. Plaintiff, Jeff D., is a seventeen-year-old boy who has been diagnosed as being emotionally disturbed with unsocialized aggression and mild mental retardation. At the age of fifteen years Plaintiff Jeff D. was removed from his normal school setting and placed at State Hospital South where he has remained to this day.

18. Jeff D. lived in many foster homes. Numerous attempts were made by Jeff D.'s counselors and social workers to locate an appropriate program for Jeff D., but

none was found to be suitable because of Jeff D.'s handicaps. Thereafter, Jeff D. was committed against his will to the custody of the Idaho State Department of Health and Welfare.

19. Upon information and belief, since the date of his commitment to the Idaho State Department of Health and Welfare, Jeff D. has suffered injury to his mental and physical well-being. Upon information and belief, Jeff D. is not receiving appropriate treatment nor participating in educational programs which are designed to meet his particular needs.

20. On information and belief, Jeff D. suffers from a treatable condition which could be improved through appropriate treatment and education. On information and belief, Jeff D. could live in a less restrictive environment if appropriate treatment and educational programs were available to him. On information and belief, no such programs are made available to Jeff D. by the Defendants or any other source presently in the State of Idaho.

21. On information and belief, the Defendants have, or should have had, long-standing knowledge of the conditions and needs of the Plaintiff. However, the Defendants, both jointly and separately, have under color of State law failed to provide appropriate treatment and educational programs for the Plaintiff in the least restrictive alternative setting.

Plaintiff Paula E.

22. Plaintiff, Paula E., is a seventeen-year-old girl who has been diagnosed as suffering from a borderline

personality disorder and mild mental retardation. At the age of fifteen years she was removed from her normal school setting and placed in State Hospital South, where she remains to this day.

23. Paula E. has been placed in several different institutions both inside and outside the State of Idaho. She presently resides at State Hospital South in Blackfoot, Bingham County, Idaho, solely because there is no other appropriate facility for her placement.

24. Upon information and belief, Paula E. is not receiving appropriate treatment nor participating in appropriate educational programs which are designed to meet her particular needs. Since the date of her commitment to the Idaho State Department of Health and Welfare, Paula E. has suffered injury to her physical and mental well being.

25. On information and belief, Paula E. suffers from a treatable condition which could be improved through appropriate treatment and education. On information and belief, Paula E. could live in a less restrictive environment if appropriate treatment and educational programs were available to her. On information and belief, no such programs are made available to Paula E. by the Defendants, or any other source presently within the State of Idaho.

26. On information and belief, the Defendants have, or should have had, long standing knowledge of the conditions and needs of the Plaintiff. However, the Defendants, both jointly and seperately, have under color of State law refused and continue to refuse to provide ap-

propriate treatment and educational programs for Plaintiff in the least restrictive alternative setting.

Plaintiff John M.

27. Plaintiff, John M., is a fifteen-year-old boy who had been diagnosed as a child with emotional problems, possible mild mental retardation, and other handicaps. Plaintiff John M. has experienced problems caused by anti-social behavior for the past several years, having been placed in special education classes and community residential programs which were not appropriate to his needs.

28. In January, 1980, Plaintiff, John M., was transferred from State Hospital South in Blackfoot, Bingham County, State of Idaho, to the Devereaux School, Texas Branch, in Victoria, Texas. On information and belief, the programs provided to Plaintiff, John M., since his commitment to the Devereaux School, have been more appropriate to meet his particular needs than any treatment available in Idaho. However, the geographical isolation of Victoria, Texas, has caused John M. to suffer a loss of contact with family, friends and others in Idaho.

29. On information and belief, John M.'s emotional problems are treatable and could be improved. On information and belief, John M. could live in a less restrictive environment if appropriate treatment and educational programs were available to him. The Defendants have or should have had long-standing knowledge of the serious emotional handicaps and the needs of Plaintiff, John M., but Defendants have refused under color of state law to provide appropriate treatment and educational pro-

grams. On information and belief, the geographical isolation of Plaintiff, John M., in Texas, has caused and will cause emotional problems frustrate his emotional development, and is not in his best interest.

Plaintiff Dusty R.

30. Plaintiff, Dusty R., is a twelve-year-old boy who has been diagnosed as having an emotional disorder, adjustment reaction of childhood with anti-social traits, and other handicaps. These have been accompanied by behavior toward other persons which is characterized as aggressive and resulted in the placement of Plaintiff, Dusty R., in a number of residential programs during the past several years.

31. Plaintiff Dusty R. was admitted to State Hospital South in Blackfoot, Bingham County, State of Idaho, in May, 1980. All placements, both inside and outside Idaho that were available to Defendants, had refused to admit Dusty R. to their programs due to over-crowding and Dusty R.'s handicaps. Finally, Plaintiff, Dusty R., was transferred to an inappropriate placement at the Idaho Youth Ranch. The placement at the Idaho Youth Ranch proved unsuccessful so he currently resides in an inappropriate placement at a group home in Boise, Idaho. The Idaho Youth Ranch and the group home in Boise, Idaho, are facilities for the custody, care and treatment of youth, independent of, but on contract to, the Idaho State Department of Health and Welfare.

32. On information and belief, no appropriate treatment and educational programs are being provided for Dusty R. at this time. Dusty R.'s emotional and physical handicaps are treatable and could be improved to allow him to reside in less restrictive environments if appropriate treatment and educational programs were available to him. Defendants have, or should have, known that Plaintiff, Dusty R., is in immediate need of appropriate treatment and educational programs and the Defendants have failed under color of State law to provide such programs.

Plaintiff Class

33. On information and belief, there are over fifty (50) children under the age of twenty-one (21) in Idaho who suffer from emotional, mental or neurological handicaps and are placed in institutional or residential settings.

34. On information and belief, these children are, or will be, confined against their will by Defendants under color of State law.

35. On information and belief, these children are not, or will not in the future, receive the special treatment and educational programs which are appropriate to their needs in the least restrictive alternative setting.

36. On information and belief, these children suffer from treatable conditions which could be improved by appropriate treatment and education.

37. On information and belief, the Defendants have, or should have had, long standing knowledge of the conditions and needs of these children. However, the Defendants have under color of State law, both jointly and

separately, failed to provide appropriate treatment and educational programs for these children in the least restrictive alternative setting.

38. On information and belief, some of these children will be placed in institutions or facilities outside the state of Idaho in which treatment and education more appropriate to the individual child's needs will be provided than is available anyplace in Idaho. However, these institutions are located far from Idaho (e.g., Texas), and hence restrict the contact of the child with his family, friends and others in Idaho.

39. On information and belief, some of these children are, or will be, placed in facilities in Idaho under contract to the Idaho State Department of Health and Welfare. On information and belief, these facilities provide more adequate treatment and education for the individual child than that available at State Hospital South, yet still do not provide appropriate treatment and education to these children in the least restrictive alternative setting.

40. On information and belief, some of these children will be placed in State Hospital South in Blackfoot, Bingham County in the State of Idaho. On information and belief, in State Hospital South these children will not receive appropriate treatment and education in the least restrictive alternative setting. On information and belief, the children placed in State Hospital South will come into contact with those treated as criminal offenders (e.g., those who are being evaluated, unfit to stand trial or have been acquitted of a crime on the grounds of mental illness under Idaho Code sections 18-211, 18-212, or 18-214, respectively.).

41. There is no reason in logic or law for the treatment and placement of the children alleged in the preceding three paragraphs. This classification of these children is arbitrary, capricious and irrational.

42. These children are, and will continue to be, confined to institutions which fail to provide appropriate treatment and education programs in the least restrictive setting which will cause these children to suffer irreparable physical and emotional harm with no presently adequate remedy at law.

VI. FIRST CAUSE OF ACTION:

EQUAL PROTECTION

43. The Fifth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Idaho in Article I, section eighteen provide that no person shall be denied equal protection of the laws.

44. The acts, practices and policies of the state Defendants have created three groups of children and adolescents. The first group of children and adolescents are those that receive all special treatment and educational services necessary; the second group is comprised of those children and adolescents who are receiving mental health and educational services but not in the least restrictive environment appropriate to their needs; the third group is comprised of those children and adolescents who are [not] receiving appropriate mental health and educational services in the environment that is [not] the least restrictive to their liberty.

45. This classification is arbitrary, irrational, unrelated to any valid purpose of providing the services,

and is unsupported by any reasonable justification. Therefore, these classifications deprive the Plaintiffs and the class they seek to represent of their right to equal protection guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, section eighteen of the Constitution of the State of Idaho.

46. As a result of said deprivation, the Plaintiffs and the class they seek to represent have suffered, are suffering and will continue to suffer an actual great, immediate and irreparable injury.

VII. SECOND CAUSE OF ACTION:

DUE PROCESS

47. The Defendants policies and practices and the Defendants failures and refusals to provide adequate or appropriate treatment and educational programs, and their failure to provide this treatment and education in the least restrictive setting consistent with the Plaintiffs' needs, denies the named and class Plaintiffs their right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution; and under Article I, sections one and thirteen of the Idaho Constitution.

48. The named Plaintiffs and the class they seek to represent have property and liberty interests, secured under state and federal law, to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and with the goal of providing these Plaintiffs with

an opportunity to develop their full potential. The state Defendants, having failed to adopt ascertainable and reasonable standards for provision of services, and having thereby exhibited a pattern and practice of arbitrarily depriving these Plaintiffs of their rights, have deprived the Plaintiffs of their rights to due process guaranteed by the Constitutions of the United States and the State of Idaho.

49. The acts, practices and policies of the state Defendants have combined to deprive these Plaintiffs of said rights without due process of law. As a result of said deprivation, these Plaintiffs and the class they seek to represent, have suffered, are suffering and will continue to suffer actual and irreparable injury.

VIII. THIRD CAUSE OF ACTION

REHABILITATION ACT OF 1973

50. Pursuant to the Rehabilitation Act of 1973 (Rehabilitation Act hereinafter, 29 U.S.C. § 794), the Idaho State Department of Health and Welfare is, as a recipient of federal funds, prohibited from discriminating against handicapped persons, including mentally impaired and/or emotionally ill children and adolescents.

51. Regulations properly promulgated and adopted pursuant to the Rehabilitation Act provide that recipients of funding, including the Idaho State Department of Health and Welfare, which provides health, welfare or other social services or benefits, may not deny those services to any qualified handicapped person, and further may not provide less effective services to some than those pro-

vided to others. 29 U.S.C. § 794; 45 C.F.R. §§ 84.4(b) (1) and 84.52.

52. The regulations also prohibit a recipient such as the Idaho State Department of Health and Welfare from denying or providing less effective aid, benefits or services to some handicapped children, than it does to other handicapped children, through its contracts, licensing or other arrangements. 45 C.F.R. §§ 84.4(b) (1), 84.52.

53. Finally, the Idaho State Department of Health and Welfare is prohibited under the regulations, either directly or through contract, from utilizing criteria or methods of administration that have the effect of perpetuating discrimination against any handicapped person(s) or group. 45 C.F.R. § 84.4(b) (4).

54. The obligations imposed on the Idaho State Department of Health and Welfare by the Rehabilitation Act are in no way obviated or alleviated by limitations of state law on the eligibility of qualified handicapped persons to receive services. 45 C.F.R. § 84.10.

55. The acts, practices and policies of the state Defendants have created three groups of children and adolescents. The first group of children and adolescents are those that receive all special treatment and educational services necessary; the second group is comprised of those children and adolescents who are receiving mental health and educational services but not in the least restrictive environment appropriate to their needs; the third group is comprised of those children and adolescents who are not receiving appropriate mental health and educational services in the environment that is not the least restrictive to their needs. This classification is ar-

bitrary, irrational, unrelated to any valid purpose of providing the services, and is unsupported by any reasonable justification. Therefore, these classifications discriminate against the members of the Plaintiff class in violation of the Rehabilitation Act of 1973.

56. The Idaho State Department of Health and Welfare consistently fails and refuses to provide needed mental health services to otherwise qualified emotionally ill and/or mentally impaired children and adolescents. The Idaho State Department of Health and Welfare has failed to provide those effective services both directly and through contract, and has perpetuated discrimination by continuing to fund and contract with programs that refuse to treat and educate those children and adolescents in the least restrictive alternative setting to the detriment and harm of the Plaintiffs and the class they represent in violation of the rehabilitation act of 1973.

57. The Regulations at 45 C.F.R. § 84.33 further provide that the Defendant, as a recipient of federal funds, must provide a free and appropriate education and related services designed to meet the individual educational needs of the handicapped children under their jurisdiction regardless of the nature of severity of the handicap. Such education and services must, under the Act, be provided in the least restrictive setting appropriate. 45 C.F.R. § 84.34.

58. The Defendants consistently fail and refuse to provide said educational and related services in the least restrictive setting appropriate, to the detriment and harm of the named Plaintiffs and the class they seek to represent and in violation of the Rehabilitation Act of 1973.

VIII. FOURTH CAUSE OF ACTION:

THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

59. Pursuant to the Education for All Handicapped Children Act (Education Act hereinafter, 20 U.S.C. §§ 1401, et seq.), the Idaho State Department of Education receives certain funds for the purpose of providing free and appropriate special education to handicapped children, both directly and through local and intermediate educational agencies.

60. As a condition precedent to receipt of those funds, the State Deparument of Education must submit, for approval by an Agency of the United States Government, a plan which contains assurances of compliance with the provisions of the Education Act and its accompanying regulations. 45 C.F.R. § 121a.110.

61. Among other statutory and regulatory requirements, the Education Act requires that those local and intermediate educational agencies which receive funds provide a "free and appropriate education" and "related services" (defined under the Act to include *inter alia,* psychological services, counseling services and diagnostic medical services) to handicapped children, including seriously emotionally disturbed children, in the least restrictive setting appropriate to their needs. 20 U.S.C. §§ 1401, 1415, 1412; 45 C.F.R. §§ 121a.13, 121a.550 *et seq.*, 121a.4.

62. "Free and appropriate education" and "related services" are to be determined for each and every handicapped child between the ages of three and twenty-one

by means of an individualized educational program, immediate implementation of which must be insured by the State Department of Education in order to comply with the Act. 20 U.S.C. § 1401; 45 C.F.R. §§ 121a.340 *et seq.* The State Department of Education must also insure that procedures are established and implemented that make available a continuum of alternative placements, including residential placements, to meet the needs of handicapped children. 20 U.S.C. § 1412(b); 45 C.F.R. § 121a.551.

63. Where any local educational agency is unable or unwilling to establish or maintain programs providing a free and appropriate education, the State Department of Education must, itself, provide special education and related services directly, by contract, or through other arrangements. 45 C.F.R. § 121a.360.

64. The Education Act further requires that the State Department of Education be immediately and singly responsible for the provision of statewide free and appropriate education including residential special education and related services so that the failure statewide to deliver those services is attributable directly to the State Department of Education. 20 U.S.C. §§ 1412, 1413.

65. Plaintiffs, and the class they seek to represent, have not received their free and appropriate residential education or the related mental health services appropriate to their needs due to the failure of the Idaho State Department of Education to fulfill its responsibility by providing those services either directly, by insuring their provision through local and intermediate educational agencies, or through interagency contract by purchasing said services from the Idaho State Department of Health

and Welfare. All of which is in violation of the Education Act.

66. The regulations of the Department of Education under the Education Act require, at 45 C.F.R. § 121a.552(a) (3), that each state agency insure that each handicapped child's educational placement is as close as possible to the child's home. The placement of Idaho children in Texas or at any other location out of the State of Idaho is almost never a placement as close to the child's home as possible, and thereby violates the Education Act.

67. The Education Act requires at 20 U.S.C. § 1412 (5) that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are to be educated with children who are not handicapped and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurrs only when necessary. The regulations at 45 C.F.R. 121a.551 require each public agency to insure that a continuum of alternative placements (regular classes, special classes, special schools, residential instruction and institutional instruction) be available to meet the needs of the handicapped children.

68. The placement by Defendants of children out of state or at State Hospital South is not a placement in the least restrictive alternative necessary to meet the needs of a child and violates the Education of All Handicapped Children Act to the harm of the Plaintiffs and the members of their class.

IX. FIFTH CAUSE OF ACTION:

DEVELOPMENTAL DISABILITIES ASSISTANCE BILL OF RIGHTS ACT

69. (1) The Idaho State Department of Health and Welfare is, as a matter of law and as a recipient of Federal funds, required to provide certain services under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001, et seq. (Disabilities Act hereinafter).

70. Under the Disabilities Act "developmental disabilities" means a disability of a person which is attributable to mental retardation or any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such persons. 42 U.S.C. § 6001(7). This definition includes the Plaintiffs and the class they represent.

71. Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities. 42 U.S.C. § 6010(1).

72. The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty. 42 U.S.C. § 6010(2).

73. The Defendants have consistently failed to provide appropriate treatment, services, education and habilitation designed to maximize the developmental potential

of the Plaintiffs and the class they represent in the setting that is least restrictive of the person's personal liberty.

74. The Defendants have or should have knowledge of their failure to provide the services required by the Disabilities Act to the Plaintiffs and the class they represent. The Defendants have consistently failed to provide these services, to the detriment and harm of the named Plaintiffs and the class they represent.

X. SIXTH CAUSE OF ACTION:

COMMUNITY MENTAL HEALTH CENTERS ACT

75. Pursuant to the Community Mental Health Centers Act, as amended (hereinafter Act, 42 U.S.C. §§ 2689, *et seq.*), Defendant Klein, or his predecessor in office, of the Idaho State Department of Health and Welfare, has submitted certain plans and in return received funds from an agency of the United States Federal Government (hereinafter U.S.)

76. The plans submitted by the Idaho State Department of Health and Welfare are subject to the prior approval of the U.S. before any funds are allocated to the state and the community mental health centers under the Act. Once allocated, funds are distributed to community mental health centers (hereinafter "center(s)") subject to the approval of the U.S.

77. As a condition of funding, each center which has received funding for three years, must provide, as part of its services, *inter alia*, a program of specialized services for the mental health of children including a full range of

diagnostic treatment, liason and follow-up services. 42 U.S.C. § 2689(b) (1) (B) (ii).

78. The Act further reqiures that every center, from the date of its initial funding, provide assistance to Courts and other public agencies in screening all individuals for provisions of services through the center as an alternative to more restrictive inpatient treatment. 42 U.S.C. § 2689 (b) (1) (A) (ii).

79. The provision of these comprehensive mental health services must, pursuant to the Act, be coordinated with the provisions of services by other health and social service agencies, including state mental health facilities, to insure that persons are receiving services as they may require. The center's services must be appropriate, available and accessible to the residents of the area promptly, and delivered in a manner which preserves human dignity and assures continuity and high quality care and which overcomes geographic, cultural, linguistic and economic barriers to the receipt of services. When medically necessary, services must be available and accessible twenty-four hours a day and seven days a week. 42 U.S.C. § 2689(b)(2).

80. The Idaho State Department of Health and Welfare has failed to establish and carry out plans designed to eliminate inappropriate placement in institutions of children and adolescents with mental health problems and has further failed to insure the availability of appropriate non-institutional services for such children and adolescents, all in violation of the Act.

81. The Idaho State Department of Health and Welfare, acting in disregard of the obvious and mandated priority of serving Plaintiff children and the class they

represent, has consistently failed and refused, due to its acts and omissions, to properly administer, supervise and implement a plan for such services, all to the detriment of the Plaintiffs and the class they represent.

82. The Plaintiffs herein, and the class they represent, have been denied the comprehensive services required under the Act by the Idaho State Department of Health and Welfare despite their recognized need for the services.

XI. SEVENTH CAUSE OF ACTION:

RIGHT TO TREATMENT IN FACILITIES

83. Idaho Constitution Article X, section 1 provides that educational, reformatory, and penal institutions, and those for the benefit of the insane, blind, deaf and dumb, and such other institutions as the public good may require, shall be established and supported by the State in such manner as may be prescribed by law.

84. On information and belief Defendants do not provide the institutions that are required for the treatment and education for the members of the Plaintiff class in the least restrictive alternative setting.

XII. EIGHTH CAUSE OF ACTION:

STATE EDUCATION STATUTES

Education of the Handicapped or others unable to Attend School.

85. The Idaho State Department of Education is responsible for the establishment programs, and employment of such supervisory and clerical personnel as may be

required to assist and direct school districts in educating handicapped children. Idaho Code § 33-2003.

86. A handicapped child includes a mentally handicapped child who is any educable minor between the ages of six (6) and twenty-one (21) years whose intellectual development renders him incapable of being practically and efficiently educated by ordinary classroom instruction and who may be reasonably expected to benefit from special programs. Idaho Code § 33-2002. The Plaintiffs and the members of their class are mentally handicapped children within the meaning of this act.

87. The Idaho State Department of Education has not established programs or employed such personnel as may be required to assist and direct the school districts in educating Plaintiffs and the members of their class.

88. The Defendants acts, practices and policies have combined to deprive the Plaintiffs and their members of their class of an education, causing them great harm.

XIII. NINTH CAUSE OF ACTION:

SEGREGATION OF CHILDREN FROM THOSE TREATED AS ADULT OFFENDERS

89. Idaho Code § 16-1812(A)(1) requires that juvenile detention facilities must be so constructed and/or maintained as to keep children segregated from adult offenders or those treated as adult offenders with their being no contact as to sight and/or sound between the two classes.

90. The practice of the Defendants results in the placement of many of the named and class Plaintiffs in state institutions like State Hospital South where there

is contact with those who are treated as criminal offenders and are either being evaluated, unfit to stand trial, or acquitted of a crime on the grounds of a mental illness under Idaho Code §§ 18-211, 18-212 or 18-214 respectively.

91. The placement of the Plaintiff class with those who are treated as adult offenders, such that there is contact as to sight and sound between the two groups violates the rights of the Plaintiff class under Idaho Code section 16-1812(A)(1). This has caused and will continue to cause great, immediate and irreparable harm to Plaintiffs and the members of their class.

IRREPARABLE HARM

92. The Plaintiffs allege that they have suffered and will continue to suffer irreparable harm to their civil rights and rights of liberty and property due to the Defendants actions, or failure to act, for which there is no adequate remedy at law.

PRAYER

WHEREFORE, Plaintiffs pray that this Court:

1. Assume jurisdiction over this action;

2. Certify the action as a class action with the classes described above;

3. Issue a preliminary injunction on behalf of the named Plaintiffs ordering the Defendants to:

   a. immediately provide appropriate education and related mental health services, so far as possible, to the Plaintiffs and the members of their class.

b. segregate all those in Plaintiffs class from all those over age 21 at State Hospital South;

4. Issue a permanent injunction ordering the Defendants to:

a. provide the Plaintiff class with appropriate, prescribed education and related mental health services including, where appropriate, diagnosis, evaluation, therapy, counseling, emergency inpatient and long or short term community based residential mental health services in the setting least restrictive of personal liberty.

b. immediately establish such procedures, agreements, contracts and policies as will insure an available, accessible and complete continuum of alternative, community-based residential programs providing education and related mental health services in the setting least restrictive of personal liberty statewide.

c. to never again admit anyone in Plaintiff case to State Hospital South;

5. Retain jurisdiction over Defendants until such time as the Court is satisfied that the acts and omissions alleged herein no longer exist and will not reoccur;

6. Award such attorney's fees and costs as are allowable pursuant to 42 U.S.C. § 1988;

7. Award such other relief, legal and equitable, as this Court may deem just and proper.

Plaintiffs, by their attorneys,

/s/ Charles Johnson
/s/ Russell E. Webb

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CIV NO. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors, by and through their next friend individually and on behalf of the class they represent,

Plaintiffs,

v.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho;

MILTON G. KLEIN, individually and in his official capacity as Director of the Idaho State Department of Health and Welfare;

JERRY EVANS, individually and in his official capacity as State Superintendent of Public Instruction of the Idaho State Department of Education;

GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as Directors of State Hospital South;

Their Successors to Office, Title and Interest,

Defendants.

ORDER APPOINTING NEXT FRIEND

(Filed August 4, 1980)

On reading the written Petition for Appointment of Next Friend for Infant Plaintiffs and the Class they Represent, and for good cause shown:

IT IS ORDERED that Charles Johnson be, and hereby is, appointed the next friend of the Plaintiffs and the class they represent, for the sole purpose of instituting and prosecuting an action in this court on behalf of said

infants for relief from the Defendants, as set forth in the petition for the appointment of the Next Friend.

DATED this 4th day of August, 1980.

/s/ Marion J. Callister
District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CASE NO. CIV 80 4091

(Title omitted in printing)

ANSWER

COME NOW, The Defendants, and each of them, and pleads to and otherwise answer Plaintiffs' Complaint as follows:

I.

DEFENSES

1. Defendants move to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted in that Plaintiffs have failed to exhaust administrative remedies available to them.

2. Defendants move to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted on the grounds that this matter is a matter against the State, prohibited by the Eleventh Amendment of the United States Constitution.

3. Defendants move to dismiss Plaintiffs' Complaint for the reason that Plaintiffs have failed to join indispensable parties.

4. Defendants move to dismiss Plaintiffs' Complaint in that the Court lacks jurisdiction to hear and determine the subject matter of this action for the reason that plaintiffs have failed to exhaust administrative remedies available to them.

5. Defendants move to dismiss Plaintiffs' Complaint for the reason that the Court lacks jurisdiction to hear this matter on the grounds that this action is against the State of Idaho, and therefore is prohibited by the Eleventh Amendment of the United States Constitution.

II.

ANSWERS

By way of answer to Plaintiffs' allegations, Defendants admit, deny and allege as follows:

1. Defendants deny every allegation contained in Plaintiffs' Complaint to which they do not specifically admit.

2. Defendants admit each and every allegation contained in the following paragraphs of Plaintiffs' Complaint:

(9), 10, 12, 30, 43, 50, 51, 52, 53, 54, 59, 60, 61, 63, 67, 69, 71, 72, 75, 76, 77, 78, 79, 83.

3. Defendants deny each and every allegation contained in the Following paragraphs of Plaintiffs' Complaint:

16, 19, 20, 24, 35, 41, 42, 44, 45, 46, 47, 49, 55, 56, 58, 65, 68, 73, 74, 80, 81, 82, 84, 87, 88, 91, 92.

4. Paragraph 1 of Plaintiffs' Complaint contains assertions of law and needs no answer. However, to the extent that the allegations contained therein do require a reference the same are denied.

5. As to Paragraph 2 of Plaintiffs' Complaint, defendants admit that some Plaintiffs are hospitalized and

others are attending residential and educational treatment centers outside the State of Idaho, including Texas, but deny each and every other allegation contained therein.

6. As to Paragraph 3 of Plaintiffs' Complaint, the allegations contained therein are assertions of law and need no answer. However, to the extent said assertions do require an answer, the same are denied.

7. As to Paragraph 4 of Plaintiffs' Complaint, Defendants admit that Plaintiff Jeff D. is a patient at State Hospital South, Bingham County, a facility of the State of Idaho Department of Health and Welfare. However, Defendants are without sufficient knowledge of information to form a belief as to the truth of Jeff D.'s residency or will, as alleged.

8. As to Paragraph 5 of Plaintiffs' Complaint, Defendants admit that Plaintiff, Paula E. is a patient at State Hospital South, Bingham County, a facility of the State of Idaho Department of Health and Welfare, but are without sufficient knowledge or information to form a belief as to the truth of Paula E.'s residency or will, as alleged.

9. As to Paragraph 6 of Plaintiffs' Complaint, Defendants admit that Plaintiff, John M. is currently at the Devereaux Foundation, Texas Branch, Victoria, Texas, a psychiatric facility on contract to the Idaho Department of Health and Welfare, but are without sufficient knowledge or information as to John M.'s residency or will.

10. As to Paragraph 7 of Plaintiffs' Complaint, Defendants admit that Plaintiff, Dusty R. was at State Hospital South, the Idaho Youth Ranch and is now in a

group home in Boise, Idaho, but are without sufficient knowledge or information to form a belief as to the truth of his residency or will.

11. As to Paragraph 8 of Plaintiffs' Complaint, Defendants admit that Charles Johnson is a citizen of Idaho, a resident of Bonneville County, Idaho, and that he sues on behalf of the above-named children as next friend. Defendants deny each and every other allegation contained herein.

12. As to Paragraph 11 of Plaintiffs' Complaint, the allegations therein are conclusions of law and require no answer. However, to the extent that an answer is required, the allegations are denied.

13. As to Paragraph 13 of Plaintiffs' Complaint, Defendants admit that the Defendants acted pursuant to state law. Defendants admit that they are state officers. The remainder of the allegations contained in Paragraph 11 of Plaintiffs' Complaint are conclusions of law which require no answer.

14. As to Paragraph 14 of Plaintiffs' Complaint Defendants deny that Plaintiffs have not been provided with appropriate treatment and educational programs in the least restrictive alternative setting. Defendants are without sufficient information or knowledge to form a belief as to the truth of the appropriate class to which Plaintiffs belong, if any. The remainder of the allegations contained in Paragraph 14 of Plaintiffs' Complaint are conclusions of law which require no answer. However, to the extent that such allegations do require answers, the same allegations are denied.

15. As to Paragraph 15 of Plaintiffs' Complaint, Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained herein.

16. As to Paragraph 17 of Plaintiffs' Complaint, Defendants are without knowledge or information to determine the meaning of Plaintiffs' allegation of "normal school setting" and therefore deny the same. Defendants admit all other allegations contained herein.

17. As to Paragraph 18 of Plaintiffs' Complaint, Defendants admit that Plaintiff, Jeff D. is in the custody of the Idaho Department of Health and Welfare pursuant to court order. However, Defendants are without sufficient knowledge or information to form a belief as to the truth of all other allegations contained in Paragraph 18 of Plaintiffs' Complaint.

18. As to Paragraph 21 of Plaintiff's Complaint, Defendants admit that they have knowledge of the conditions and needs of Plaintiff, Jeff D. Defendants deny each and every other allegation contained in Paragraph 21 of Plaintiffs' Complaint.

19. As to Paragraph 22 of Plaintiffs' Complaint, Defendants are without knowledge or information to determine the meaning of Plaintiffs' allegation of "normal school setting" and therefore deny the same. Defendants admit all other allegations contained therein.

20. As to Paragraph 23 of Plaintiffs' Complaint, Defendants admit that Plaintiff, Paula E. is a patient at State Hospital South. Defendants deny that such placement is inappropriate. Defendants are without suffi-

cient knowledge or information to form a belief as to the truth of all other allegations contained therein.

21. As to Paragraph 25 of Plaintiffs' Complaint, Defendants deny that Plaintiff Paula E. has not received appropriate treatment and education. However, Defendants do not have sufficient knowledge or information to form a belief as to the truth of all other allegations contained herein.

22. As to Paragraph 26 of Plaintiffs' Complaint, Defendants admit that they have knowledge of Plaintiff Paula E.'s conditions and needs. Defendants deny each and every other allegation contained therein.

23. As to Paragraph 27 of Plaintiffs' Complaint, Defendants admit that Plaintiff John M. is a fifteen-year-old child with emotional problems, possible mild mental retardation and other handicaps, and has experienced problems caused by anti-social behavior. Defendants deny each and every other allegation contained therein.

24. As to Paragraph 28 of Plaintiffs' Complaint, Defendants admit that Plaintiff John M. is physically located in Texas. However, Defendants allege that he was transferred from Region IV of the Idaho Department of Health and Welfare, not State Hospital South. Defendants are without sufficient knowledge or information to form a belief as to the truth of every other allegation contained therein.

25. As to Paragraph 29 of Plaintiffs' Complaint, Defendants admit they have knowledge of the handicaps and needs of Plaintiff John M., but deny each and every other allegation contained therein.

26. As to Paragraph 31 of Plaintiffs' Complaint, Defendants admit that Plaintiff, Dusty R. was admited to State Hospital South in May of 1980 for evaluation under the provisions of the Child Protective Act. Defendants admit that said Plaintiff was transferred to the Youth Ranch and a group home in Boise, both facilities on contract with the Idaho Department of Health and Welfare. Defendants are without sufficient information and knowledge to form a belief as to the truth of all other allegations contained therein.

27. As to Paragraph 32 of Plaintiffs' Complaint, Defendants admit that said Plaintiff is being treated and educated. Defendants are without sufficient knowledge to form a belief as to the truth of the allegation that said Plaintiff's conditions are or can be improved. Defendants deny each and every other allegation contained in said Paragraph 32.

28. As to Paragraph 33 of Plaintiffs' Complaint, Defendants deny the allegations contained therein as to the members in the class, if any, the extent of their handicaps and the nature of the facility of their placement.

29. As to Paragraph 34 of Plaintiffs' Complaint, Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained therein.

30. As to Paragraph 36 of Plaintiffs' Complaint, Defendants admit that Plaintiffs suffer from treatable conditions, but deny that their present treatment and education are inappropriate.

31. As to Paragraph 37 of Plaintiffs' Complaint, Defendants admit they have knowledge of Plaintiffs' con-

ditions and needs, but deny each and every other allegation contained therein.

32. As to Paragraph 38 of Plaintiffs' Complaint, Defendants are without sufficient knowledge and information to form a belief as to the truth of the allegations contained therein.

33. As to Paragraph 39 of Plaintiffs' Complaint, Defendants admit that some of the children are or will be placed in facilities in Idaho under contract to the Idaho State Department of Health and Welfare. Defendants deny each and every other allegation contained therein.

34. As to Paragraph 40 of Plaintiffs' Complaint, Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained therein. Said allegations are speculative. Defendants deny that at State Hospital South these children will not receive appropriate treatment and education in the least alternative setting.

35. As to Paragraph 48 of Plaintiffs' Complaint, Defendants admit that the named Plaintiffs and the class they seek to represent, if any, have property and liberty interests, secured under state and federal law, to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and with the goal of providing these Plaintiffs with an opportunity to develop their full potential. Defendants deny each and every other allegation contained therein.

36. As to Paragraph 57 of Plaintiffs' Complaint, Defendants admit the allegations contained therein, and

further allege that there are other entities not parties hereto that have obligations under 45 CFR § 84.33 and 45 CFR § 84.34.

37. As to Paragraph 62 of Plaintiffs' Complaint, Defendants admit that the State Department of Education must also insure that procedures are established and implemented that make available a continuum of alternative placements, including residential placements, to meet the needs of handicapped children. 20 U.S.C. § 1412 (b); 45 CFR § 121a.551. Defendants deny each and every other allegation contained therein.

38. As to Paragraph 64 of Plaintiffs' Complaint, the allegations contained therein are conclusions of law to which no answer is required. However, if an answer thereto is required, Defendants deny the same as an accurate description of the law.

39. As to Paragraph 66 of Plaintiffs' Complaint, Defendants admit that the regulations of the Department of Education under the Education Act require, at 45 C.F.R. § 121a.552(a) (3), that each state agency insure that each handicapped child's educational placement is as close as possible to the child's home. Defendants deny each and every other allegation contained therein.

40. As to Paragraph 70 of Plaintiffs' Complaint, Defendants are without sufficient knowledge or information to form a belief as to whether or not the definition contained therein includes Plaintiffs' and the class, if any, they represent. Defendants admit every other allegation contained therein.

41. As to Paragraph 85 of Plaintiffs' Complaint, Defendants deny each and every allegation contained

therein. However, Defendants admit that the State Board of Education has such responsibility.

42. As to Paragraph 86 of Plaintiffs' Complaint, Defendants deny the accuracy of Plaintiffs' definition contained therein. Defendants are without sufficient knowledge and information to form a belief as to whether or not said definition includes Plaintiffs and the class, if any, may represent.

43. As to Paragraph 89 of Plaintiffs' Complaint, Defendants admit each and every allegation contained therein. However, for purposes of Section 616-1812 (A) (1), State Hospital South is not a juvenile detention facility.

44. As to Paragraph 90 of Plaintiffs' Complaint, Defendants admit that Plaintiffs Jeff D. & Paul E. are patients at State Hospital South. They are in a residence called Eagle Lodge where some other patients are residing who have been hospitalized pursuant to Idaho Code Sections 18-211, 18-212, and 18-214. Defendants deny that State Hospital South is a juvenile detention center.

Wherefore, Defendants pray that:

1. Plaintiffs' Complaint be dismissed with prejudice;

2. That Plaintiffs take nothing by their cause of action;

3. For costs and reasonable attorneys' fees as provided by law; and

4. For such other further relief the Court deems proper.

DATED this ..... day of September, 1980.

DAVID H. LEROY
ATTORNEY GENERAL

.....
JAMES R. HARGIS
Deputy Attorney General

.....
STEVEN W. BERENTER
Deputy Attorney General

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 80-4091

JEFF D., PAULA E., JOHN M., DUSTY R., minors, individually and on behalf of the class they represent, by and through their next friend, CHARLES JOHNSON and MARK CLARY, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, LES PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

STIPULATION IN SETTLEMENT OF CLAIMS AGAINST EDUCTION DEFENDANTS AND FOR PROVISION OF EDUCATION SERVICES; AND ORDER

COMES NOW the plaintiffs in the above entitled action by and through their counsel and defendant Jerry Evans, individually and in his official capacity as State Superintendent of Public Instruction of the Idaho State Department of Education, and hereby stipulate as follows:

1. This is a class action for declaratory and injunctive relief on behalf of the named plaintiffs and the class they represent consisting of all Idaho children under the age of twenty-one (21) who now or will in the future, suffer from emotional or mental handicaps and who are, or will in the future, be institutionalized or otherwise placed in residential programs of defendants. Plaintiffs and the

class they represent seek relief from the defendants' alleged failure to provide adequate or appropriate treatment and educational programs in the least restrictive setting in violation of plaintiffs' rights under the Fifth (5th) and Fourteenth (14th) Amendments to the United States Constitution; Article I, Section One, Thirteen and Eighteen, and Article X, Section One of the Constitution of the State of Idaho; the Community Mental Health Centers Act (42 U.S.C.A. 2661); the Rehabilitation Act of 1973 (29 U.S. C.A. 794); the Education for all Handicapped Children Act (20 U.S.C.A. 1401); the Developmental Disability Assistance and Bill of Rights Act (42 U.S.C.A. 6000); the Idaho State Education of the Handicapped and Others Unable to Attend School Statutes (Idaho Code Section 33-2001) and the Idaho Youth Rehabilitation Act (Idaho Code Section 16-1800).

The named plaintiffs and the class they represent have property and liberty interests, secured under those federal and state laws, to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and with the goal of providing these plaintiffs with the opportunity to develop their full potential.

2. Jurisdiction is conferred on the Court by 28 U.S. C.A. 1343(3) and (4) for claims for relief arising under 42 U.S.C.A. 1983. Jurisdiction is conferred on this court to hear claims under the Education for all Handicapped Children Act (20 U.S.C.A. 1401) by 20 U.S.C.A. 1415(e)(3). Plaintiffs' action for declaratory relief is authorized by 28 U.S.C.A. 2201 and 2202. Plaintiffs' state claims may properly be considered under the exercise of this court's pendant jurisdiction.

3. Defendant John V. Evans is a citizen of the State of Idaho, Governor of the State of Idaho and the ex officio Director of the Budget for the State. As Director of the Budget, defendant Evans has executive authority for reviewing the budget requests of state agencies, determining budgetary needs for each state agency and submitting to the Idaho State Legislature of a proposed budget for all state agencies.

4. Defendant Les Purce is the Director of the Idaho State Department of Health and Welfare and has statutory administrative responsibility for the State's treatment programs for children in the State who are committed to institutions of said Department.

5. Defendant Jerry Evans is the State Superintendent of Education in Idaho. In this capacity he is responsible for planning, developing and monitoring (by contract or otherwise) the educational programs in Idaho for juveniles between the ages of five (5) and twenty-one (21) years, including plaintiffs and the class they represent.

6. Defendants George Bachik and Carroll Elmore are, respectively, the Administrative and Clinical Directors of State Hospital South in Blackfoot, Bingham County, State of Idaho, a facility of the Idaho State Department of Health and Welfare. In these capacities they are responsible for the custody, care and treatment of part of the plaintiff class.

7. The defendants are sued and are responsible in their official capacities and at all times material to this action, they have acted under color of state law, custom and usage of the State of Idaho. Their successors in office, title and interest are also named as defendants and

are responsible in this action and responsible for compliance with this Stipulation.

8. There are over two thousand (2,000) handicapped children who come within the definition of the class as defined by plaintiffs. The members of the class are so numerous that joinder of all members is impractical. The predominant questions of law and fact are common to all members of the class, including the alleged policies and practices challenged in this action which defendants apply consistently to similarly situated members of the class. The claims of the named plaintiffs are typical of the claims of the class and the plaintiffs will fairly and adequately protect the interests of the entire class. The declaratory and injunctive relief sought by the named plaintiffs is typical of the relief sought by all members of the class. The prosecution of separate actions by or against individual members would create a risk of inconsistent or varying adjudications with respect to individual class members which would, as a practical matter, be dispositive of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests and, in either event, the defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

9. The parties stipulate that this court shall certify this action as a class action pursuant to Federal Rules of Civil Procedure 23(b) (1) and (2) with the class defined as follows:

> All Idaho youths under the age of twenty-one (21) years who suffer from emotional or mental illness, either alone or in conjunction with another mental de-

fect(s), and who because of such afflictions or conditions are placed in the care and custody of the Idaho State Department of Health and Welfare as follows:

A. In residence at State Hospital South, Blackfoot, Idaho, or State Hospital North, Orofino, Idaho;

B. In residence in any institution outside of the State of Idaho; or

C. In residence in any facility for the treatment, detention or housing of such youths within the State of Idaho that is operated by or under contract with the State of Idaho; specifically excluding the Idaho State School and Hospital in Nampa, Idaho.

10. Plaintiffs seek free appropriate public education and treatment for their handicaps in the setting least restrictive of personal liberty. Defendant Jerry Evans and the Idaho State Department of Education enter into this Stipulation as a compromise of disputed claims and do not admit any failure, liability or defalcation for past actions. The parties enter into this Stipulation in settlement and compromise of the claims contained in the class action Complaint for Declaratory and Injunctive Relief and Intervenor's Complaint on file herein.

11. Jerry Evans, individually and in his official capacity as State Superintendent of Public Instruction of the Idaho State Department of Education and the Idaho State Department of Education hereby stipulate and agree that:

a. The Idaho State Department of Education as lead agency shall ensure that a free and appropriate public education is provided plaintiffs and the class they represent, between the ages of five (5) and twenty-one (21) through arrangements with local school districts or other entities as required by the Education for All Handicapped

Children Act of 1975 (20 U.S.C. § 1401 et. seq., "The Act") and the Idaho State Education of the Handicapped and Others Unable to Attend School Statute (Idaho Code § 13-2001 et. seq., "The Statute").

b. Provided, however, that with respect to those plaintiffs who are placed in any institution outside the State of Idaho (paragraph 9.B. above), for other than educational purposes, the State Department of Education:

i. Has no responsibilities to ensure that a free appropriate public education is provided to each individual plaintiff in accordance with the Act or the Statute.

ii. Has a responsibility, in conjunction with other applicable agencies, to access the numbers and types of plaintiffs placed outside the State of Idaho (paragraph 9.B. above), to evaluate the ongoing educational programs provided to these plaintiffs, and make recommendations for the education of these plaintiffs; pursuant to the Act, the Statute and the regulations thereunder, now or as hereinafter amended. The State Department of Education will put these recommendations into effect so far as possible and shall, where necessary, make budgetary requests from the Idaho State Legislature in order to implement these recommendations.

iii. Notwithstanding, the Idaho State Department of Education has the responsibility, pursuant to the Act and the Statute, to ensure that these plaintiffs have available to them services generally equivalent to the education services provided to non-handicapped youth as set forth in paragraph 11(f) and to develop procedures for these plaintiffs as required by paragraph 11(j).

c. The educational philosophy in providing appropriate education services shall be that all plaintiffs and the class they represent between the ages of five (5) and twenty-one (21) are presumed to be capable of benefiting from education. Such plaintiffs shall be provided a free appropriate public education as defined by the Act and the State regardless of degree of handicap or accompanying disabilities.

d. Individual education evaluations and individual education plans shall be prepared for each plaintiff and the class they represent in conformity with the Act and the Statute, and the regulations thereunder (including 45 C.F.R. § 121.a) now or as henceforth amended. The child study teams shall secure prior educational records of each child. Each individual education plan shall be separate from, yet coordinated with, the treatment and the treatment plan of each plaintiff.

e. Education services for each plaintiff and the class they represent shall be provided in accordance with the individual education plan developed for each plaintiff and in the least restrictive environment as determined for each individual plaintiff as party of his or her individual education plan.

f. Education services for each plaintiff and the class they represent shall be generally equivalent to the education services provided to other youth in the State of Idaho in terms of:

i. Teacher and staff qualifications and in-service training;

ii. Program hours per student;

iii. Nature and quality of programs;

iv. Curriculum guides, resource and classroom materials and equipment; and

v. Class size and number of students per teacher.

g. Sufficient teacher's aides and other assistants shall be provided to plaintiffs and the class they represent in accordance with the Act and the Statute and the Administrative Rules and Regulations for Special Education as adopted by the Idaho State Board of Education.

h. Generally, the educational programs shall be provided to plaintiffs and the class they represent for six (6) hours per day. For this purpose, educational programs may include educational activities such as therapy, counseling, physical education and similar nonacademic programs of instruction. In exceptional cases, plaintiffs may receive fewer than six (6) hours of educational activity per week day if determined to be appropriate by a child study team responsible for the development of a plaintiff's individual education plan.

i. The State Department of Education shall develop, in conjunction with other applicable agencies and school districts, procedures to ensure that educational services are provided to plaintiffs and the class they represent in the least restrictive environment. To facilitate placement in the least restrictive environment, the Department shall seek out and develop education services in the local school districts for plaintiffs who are able to take advantage of such education services with the goal of providing these services to the plaintiff class in the local school districts as soon as possible.

j. The State Department of Education, in conjunction with other applicable agencies or school districts, shall develop procedures to ensure that the local school districts which will continue the education program for plaintiffs, and the class they represent, to be transferred to the community: (i) are advised of the timetable for any pending transfer; and (ii) are provided a written summary of the education programs of the student, a copy of the student's individual education plan, and any other relevant educational records in order to assure that appropriate educational programs/placements will be available without unreasonable delay.

k. The State Department of Education shall ensure the establishment of procedural safeguards as required by the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et. seq., its accompanying rules and regulations, 45 C.F.R. Part 121(a), subpart F; the Statute and the Administrative Rules and Regulation for Special Education for the State of Idaho, now or as hereinafter amended, for plaintiffs and the class they represent. Such procedural safeguards shall be the method by which problems in, or complaints with, a child's individual Education Plan shall be addressed. However, complaints which reflect problems regarding the provision of education services to the plaintiff class, as addressed in this Stipulation, may be placed before this court for resolution, by contempt sanction or otherwise. Nothing in this Stipulation shall be construed to limit or otherwise alter the duties and responsibilities of local school districts as set forth by applicable State and Federal law.

12. General Provisions:

a. The defendant Jerry Evans and the Idaho State Department of Education shall act in concert in all cases and whenever necessary and possible with the other defendants in this action to help ensure the delivery of appropriate mental health and educational services to members of the plaintiff class in an individually appropriate setting that is least restrictive of personal liberty within the State of Idaho.

b. The defendants shall, on September 1, 1982, and every year thereafter for five (5) years or until the court otherwise so orders (see below), file a report with the above entitled court, with a copy to plaintiffs' counsel of record; such report shall detail the extent of defendants' compliance with this Consent Decree, and the future plans for compliance with this Consent Decree.

c. The parties will attempt to reconcile any difficulties with the implementation of this Consent Decree. However, the plaintiff class or their representatives (next friend or Idaho Legal Aid Services, Inc.) shall have the power to submit any dispute effecting the entire plaintiff class under this Consent Decree to the above entitled court for decision by contempt sanction or otherwise, should reconciliation fail.

d. The court will retain jurisdiction over this action for five (5) years or until the court is satisfied, by Stipulation or otherwise, that the actions and omissions complained of herein no longer exist and will not reoccur.

e. Each party shall bear their own attorney's fees and costs thus far incurred.

DATED this 14 day of October, 1981.

/s/ Charles Johnson
Next friend for Plaintiffs
Attorney for Plaintiffs

/s/ Russell E. Webb
Attorney at Law for Plaintiff Class

/s/ Jerry L. Evans
Director Idaho State Department of Education

/s/ Steve Berenter
Deputy Attorney General Idaho State Department of Education

ORDER OF THE COURT

Based on the above Stipulation, the settlement in the above entitled matter is hereby approved, and the provisions of the Stipulation are the order of this court. IT IS SO ORDERED.

DATED this 19th day of October, 1981.

/s/ Marion J. Callister
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson,

Plaintiffs,

vs.

JOHN V. EVANS, MILTON G. KLEIN, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities, their Successors to Office, Title and Interest,

Defendants.

O R D E R

Plaintiffs and defendants having filed cross-motions for summary judgment, and the Court having reviewed the matter, heard the arguments of counsel and considered the briefs and all other pleadings filed in this matter; and the Court having filed its memorandum decision herein and in accordance with the findings and conclusions contained in said memorandum decision and as a matter of law;

IT IS HEREBY ORDERED:

1. That the defendants' motions for summary judgment on the basis that Idaho Code §§ 66-329, 66-344; Idaho Constitution, article X, section 1; 42 U.S.C. §§ 2689, 6010, 6065, and 29 U.S.C. § 794 do not support plaintiffs' claim that the State has an affirmative duty to provide additional facilities to offer treatment in the least restrictive

environment be, and the same is hereby, GRANTED; and

2. That the motions for summary judgment regarding the federal Constitution and Idaho Code § 39-4605 are hereby DENIED on the ground that genuine issues of material fact remain to be resolved.

DATED this 26th day of July, 1982.

/s/ Marion J. Callister
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CIV 80-4091

JEFF D., et al.,

Plaintiffs,

v.

JOHN V. EVANS, et al.,

Defendants.

STIPULATION FOR CLASS CERTIFICATION and ORDER

(Filed September 7, 1982)

COME NOW the parties to the above entitled cause of action and hereby stipulate that the class in this matter may be defined as follows:

All Idaho juveniles under the age of eighteen (18) years who have been or will be diagnosed by the Idaho State Department of Health and Welfare as suffering from emotional or mental illness, either alone or in conjunction with another mental defect(s), and because of such condition are placed in, or committed to, the care and custody of the Idaho State Department of Health and Welfare as follows:

A. In residence at State Hospital South, Blackfoot, Idaho, or State Hospital North, Orofino, Idaho;

B. In residence in any institution outside of the State of Idaho; or

C. In residence in any facility for the treatment, detention or housing of such youths within the state of Idaho; specifically excluding the Idaho State School and Hospital in Nampa, Idaho.

Dated this 2nd day of Septmber, 1982.

/s/ James Wickham
Attorney for Health and Welfare Defendants

/s/ Charles Johnson
Attorney for Plaintiffs

ORDER

Based on the above Stipulation, IT IS SO ORDERED.

/s/ Marion J. Callister
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. Civ. 80-4091

(Title omitted in printing)

RESPONSE TO REQUESTS
FOR ADMISSIONS

Pursuant to Rule 36, F.R.C.P., Defendants Thomas L. Pierce, George Bachik and Carroll Elmore respond to Plaintiffs Requests for Admissions dated September 3, 1982 as follows:

1. That the class in this matter may be defined as follows:

> All Idaho juveniles under the age of eighteen (18) years who have been or will be diagnosed by the Idaho State Department of Health and Welfare as suffering from emotional or mental illness, either alone or in conjunction with mental defect(s), and because of such condition are placed in, or committed to, the care and custody of the Idaho State Department of Health and Welfare as follows:
>
> A. In residence at State Hospital South, Blackfoot, Idaho, or State Hospital North, Orofino, Idaho;
>
> B. In residence in any institution outside of the State of Idaho; or
>
> C. In residence in any facility for the treatment, detention or housing of such youths, within the State of Idaho; specifically excluding the Idaho State School and Hospital in Nampa, Idaho.

RESPONSE: Admitted.

2. That this Court should order that the class in this matter be defined as follows:

> All Idaho juveniles under the age of eighteen (18) years who have been or will be diagnosed by the Idaho

State Department of Health and Welfare as suffering from emotional or mental illness, either alone or in conjunction with another mental defect(s), and because of such condition are placed in or committed to, the care and custody of the Idaho State Department of Health and Welfare as follows:

A. In residence at State Hospital South, Blackfoot, Idaho, or State Hospital North, Orofino, Idaho;

B. In residence in any institution outside of the State of Idaho; or

C. In residence in any facility for the treatment, detention or housing of such youths, within the State of Idaho; specifically excluding the Idaho State School and Hospital in Nampa, Idaho.

RESPONSE: Admitted.

3(a). There are over two thousand (2000) and perhaps as many as six thousand (6000) juveniles in Idaho under twenty-one (21) years of age who are, or will be in the future, institutionalized or otherwise placed at in residential programs outside their parents home (juveniles, hereinafter).

RESPONSE: Admitted.

3(b). Of these, about forty (40) to fifty (50) are at any one time, placed at State Hospital South in Blackfoot, Bingham County, State of Idaho.

RESPONSE: Denied.

4. *Jeff D.* was a seventeen (17) years old male (at the time this lawsuit was filed) who has been diagnosed as being emotionally disturbed with unsocialized aggression and mild mental retardation. At the age of fifteen

(15) years, he was removed from his home community setting and committed against his will to the custody of the Idaho State Department of Health and Welfare. He was placed in State Hospital South where he remained until he was "transferred" to the Youth Services Center in St. Anthony, Idaho; Youth Services Center is a facility of the Idaho State Department of Health and Welfare. Plaintiff Jeff D. has recently been readmitted to State Hospital South.

RESPONSE: Admitted, denied that he was "transferred" to the Youth Services Center.

5. *Paula E.* was a seventeen year old female (at the time this lawsuit was filed) who has been diagnosed as suffering from a boarderline personality disorder and mild mental retardation. At the age of fifteen (15) years she was removed from her home community setting and committed to the custody of the Idaho State Department of Health and Welfare. She was placed at an out of state treatment facility and then at State Hospital South where she remains to this day.

RESPONSE: Admitted.

6. *John M.* was a fifteen year old male (at the time this lawsuit was filed) who has been diagnosed as suffering from emotional problems, possible mild retardation, and other handicaps. He has experienced problems caused by anti-social behavior. John M. was committed to the custody of the Idaho State Department of Health and Welfare and placed at State Hospital South for a short period. However, the Idaho State Department of Health and Welfare then transferred John M. to the Deveraux

School in Victoria, Texas, a facility under contract to the Idaho State Department of Health and Welfare.

RESPONSE: Admitted.

7. *Dusty R.* was a twelve (12) year old male (at the time this lawsuit was filed) who has been diagnosed as having an adjustment reaction to childhood and other handicaps. Dusty has engaged in aggressive behavior toward some people which has resulted in his placement in a number of residential programs during the past several years. Dusty R. was admitted to State Hospital South in May, 1980, for evaluation. After a brief stay he was transferred to the Idaho Youth Ranch in Rupert, Idaho. The placement at the Idaho Youth Ranch was not satisfactory so he was transferred to a group home in Boise, Idaho.

RESPONSE: Admitted.

8. The defendants have had knowledge of the conditions of the named and class plaintiffs, and of the problems complained of in this lawsuit. At all times in this lawsuit the defendants have acted in their official capacities under the color of state law.

RESPONSE: Admitted.

9. The named plaintiffs and members of the class they represent are housed on facilities and units where there is physical contact with adult mental patients (some of whom are child molesters or have been otherwise charged with criminal conduct.)

RESPONSE: Admitted.

10. There have been incidents of abuse (sexual or otherwise)of the plaintiffs, and the class they represent,

by psychiatric patients in facilities under the control of defendants.

RESPONSE: Denied, admitted that there have been isolated incidents in which plaintiffs have been injured by other patients.

• • •

12. Children and Adolescents should be separated from Adult Mental Patients at all facilities. Segregation of juveniles from adults would be a common practice around the country for child treatment programs.

RESPONSE: Denied.

13. The minimum age a plaintiff should be at State Hospital South (or any other adult facility) would be age seventeen (17) years.

RESPONSE: Denied.

14(a). However, State Hospital South is still forced to admit children below the age of seventeen (17) years.

RESPONSE: Admitted State Hospital South admits minors', denied it is "forced."

14(b). Apparently, State Hospital South used to segregate children from adult mental patients. Combining these two groups is a recent development.

RESPONSE: Denied.

15. The named and class plaintiffs suffer from treatable conditions which can be improved through the provision of appropriate mental health services.

RESPONSE: Denied, admitted as to some, but not all plaintiffs.

16. Most of the named and class plaintiffs suffer from treatable conditions which can be improved through the provision of appropriate mental health services.

RESPONSE: Admitted.

17. The named and class plaintiffs suffer from treatable conditions which can be improved through the provision of appropriate mental health services, including minimally adequate or reasonable training to ensure safety and freedom from undue restraint.

RESPONSE: Denied, admitted as to most plaintiffs.

18. The named and class plaintiffs suffer from treatable conditions which can be improved through the provision of appropriate mental health services provided by qualified and appropriate professionals.

RESPONSE: Denied, admitted as to most plaintiffs.

19. The named and class plaintiffs could live in more appropriate community based settings less restrictive of personal liberty than psychiatric institutions (like State Hospital South) or out of state facilities.

RESPONSE: Denied, admitted as to most plaintiffs.

20. Most of the named and class plaintiffs could live in more appropriate community based settings less restrictive of personal liberty than psychiatric institutions

(like State Hospital South) or out of state facilities if such facilities existed.

RESPONSE: Denied, most plaintiffs do live in community based settings.

21(a). The deposition of George Bachik, pages 60, 63 (lines 11-15) and 74-75 made it clear that "almost all" of the plaintiffs could be placed in the community, and that if there were more money available, the necessity of placing plaintiffs at State Hospital South could be eliminated.

RESPONSE: Admitted.

21(b). Thus, the only reason plaintiffs are held in overly restrictive adult psychiatric hospitals is the lack of less restrictive alternatives in Idaho.

RESPONSE: Denied.

21(c). Mr. Bachik felt that the named plaintiffs could live in community based less restrictive treatment settings in his deposition.

RESPONSE: Denied.

21(d). John M. actually was transferred to a less restrictive setting at the Deveraux Foundation in Victoria, Texas, and Dusty R. (page 119) was also actually transferred to a setting less restrictive of personal liberty in Idaho.

RESPONSE. Admitted, denied that Deveraux is per se less restrictive.

21(e). Mr. James Antram, in his deposition (at pages 37-38), stated that if appropriate less restrictive community based programs existed in Idaho the majority (perhaps 90%) of the placements of plaintiffs at State Hospital South could be eliminated.

RESPONSE: Admitted.

21(f). The defendants' own State Mental Health Program accepts the concept of treatment should take place in the setting least restrictive of personal liberty. *Idaho Mental Health Program,* pages 7 and 9, clearly states that:

> Service should be provided in the least restrictive setting in and which it is possible to facilitate treatment, yet insure the safety of the client and all persons concerned. To the extent possible, disabled persons should be integrated throughout the community rather than segregated in "institutional" settings. In work, education and leisure activities, the mentally ill should participate with the general community.

RESPONSE: Admitted.

21(g). Moreover, the costs of placing a person in a more restrictive, or out of state facility, are higher than treatment in less restrictive community based facilities.

RESPONSE: Denied.

21(h). See *Idaho Mental Health Program,* pages 52-53. "It may be inferred then, that the indirect costs of *not* providing adequate treatment may far exceed the costs of providing such treatment" (Id. at 91). There is however, a higher initial start up (capital) cost.

RESPONSE: Admitted that the document so states.

21(i). Finally, the named and class plaintiffs suffer loss of contacts with family and friends from placement at psychiatric facilities, including State Hospital South. This, in turn, hinders the recovery and placement of plaintiffs and the class they represent.

RESPONSE: Denied, admitted as to most plaintiffs.

22. The named and class plaintiffs' conditions have not significantly improved, or have gotten worse, during their custody by defendants.

RESPONSE: Denied.

23. Some of the named and class plaintiffs' conditions have not significantly improved, or have gotten worse, during their custody by defendants.

RESPONSE: Admitted.

24. Jeff D., Paula E., and John M. still reside in defendants' facilities, though Dusty R. has made enough adjustments to live in a community based treatment facility. The deposition of George Bachik says, at page 91 that Jeff D.'s condition is "about the same" as before, and at page 102 where Paula E.'s condition has "neither improved nor regressed" during her stay at State Hospital South.

RESPONSE: Admitted as to facts when statements were made.

25. The mental health services and programs provided to John M. and the sub-class of plaintiffs placed

outside the State of Idaho is superior to, and more appropriate to the needs of the individual, than those programs provided to the named and class plaintiffs in the State of Idaho.

RESPONSE: Admitted as to those plaintiffs placed out of state for treatment reasons, denied as to most plaintiffs.

26. The deposition of George Bachik on pages 13 (line 3), 22 (lines 17-20), 113, and page 15 (lines 13-23) described these out of state facilities as follows:

> (They are) fairly well specialized for adolescent treatment, and somewhat non-restrictive (in) environment.
>
> I think as far as the compliance with Public Law 94-142, I think they have pretty good schools as a rule, and I think they have the necessary child psychiatrists and child psychologists for implementing a children's program.

The deposition of James Antram reflects that of Mr. Bachik on this point. See pages 47-49, and specifically page 48 (lines 15-25) where he says:

> "Some do quite a good job, others do not. Principally, the contrasting difference would be that the program and services offered in the out of state facilities would be specific to children in that they would offer an organized program, organized service effort, that is generally geared specifically to the child. That's the major variance between what would be offered at those facilities and what would be offered (inside Idaho)."

RESPONSE: Admitted, denied any inference that any placement is appropriate for all plaintiffs, or that the out of state facilities referenced are appropriate for all plaintiffs.

27. However, the geographical isolation of the named and class plaintiffs outside the State of Idaho causes a loss of contact with family and others in Idaho, which in turn causes plaintiffs emotional difficulty and hinders the treatment and recovery of these plaintiffs. This isolation also makes it difficult for defendants to monitor the progress and conditions of these youths.

RESPONSE: Denied, admitted as to most plaintiffs.

28. The only reason class plaintiffs are sent out of state is the lack of an appropriate institution inside the State of Idaho to serve the needs of the plaintiffs.

RESPONSE: Admitted as to plaintiffs placed for treatment reasons.

29. The *Idaho Mental Health Program,* page 81, states:

> These children . . . are referred to out of state facilities. This procedure conflicts with the philosophy that treatment should be provided as close as possible to the client's community and family. About 50 children each year are sent out of state at a cost of excess of $600,000.00 per year.

Obviously, in the words of the Department, "If appropriate programs were available, these funds could have remained instate to benefit Idaho's economy, and the children and their families would have benefited from placement closer to home."

RESPONSE: Admitted as to facts in 1979.

30. Plaintiff youth do improve in these out of state facilities, which causes them to return to Idaho.

RESPONSE: Denied, plaintiff's return for a variety of reasons including availability to local resources.

31. Therefore, the named and class plaintiffs should be provided programs inside the State of Idaho similar to those provided by defendants to class plaintiffs outside the State of Idaho.

RESPONSE: Denied.

• • •

39(a). Some of the named and class plaintiffs are placed at Youth Services Center. About 25 percent of those so placed had learning disabilities but the Youth Services Center has no special program for youths with learning disabilities, as specified in education statutes, and the educational program at Youth Services Center is not accredited by the State Board of Education.

RESPONSE: Denied.

39(b). Also, about 76% of the children placed at Youth Services Center suffer from drug and alcohol problems and/or serious emotional disturbances.

RESPONSE. Admitted.

39(c). Yet the Youth Services Center is not adequately staffed nor programmed to deal with such youngsters.

RESPONSE: Denied.

40(a). There are no licensed specialists in child psychology or child psychiatry for the plaintiffs in the defendants' employment in Idaho.

RESPONSE: Denied, admitted as to State Hospital South.

40(b). As to the lack of staff to treat juveniles at State Hospital South, the deposition of George Bachik, page 29, lines 3-7, make it clear that he does not have any staff that are currently experienced or qualified to provide specialized juvenile treatment and services.

RESPONSE: Admitted.

41(a). The deposition of George Bachik, Administrative Director at State Hospital South, speaks rather directly on the subject of the lack of specialized juvenile psychiatric services at State Hospital South. In this deposition, page 11, lines 5-18, Mr. Bachik admitted that "We don't have programs designed exclusively for juveniles."

RESPONSE: Admitted.

41(b). Thus, there are no purely psychological services for juveniles at this time in Idaho.

RESPONSE: Denied.

42(a). George Bachik made it clear in his deposition that State Hospital South is primarily an adult hospital which makes no special effort to treat juveniles. State Hospital South offers no special programs for those under age eighteen at all.

RESPONSE: Admitted.

42(b). In his deposition Mr. Bachik stated that there are no criteria for admission of youth to State Hospital

South and that the only reason State Hospital South admits plaintiff youth is that there is no other place for them to go.

RESPONSE: Denied.

43. Thus, State Hospital South is used when inappropriate (see Bachik deposition, pages 20 and 77). In fact, all the named plaintiffs were inappropriately placed at State Hospital South at one time for the reason that there was no other appropriate facility in Idaho.

RESPONSE: Denied.

44(a). The defendants own *Idaho Mental Health Program* states, on page 41, that: "The need for an in state residential treatment facility for (emotionally disturbed) children has been clearly documented." "The most evident gap in children's mental health services in the absence of an in state residential treatment facility for severely emotionally disturbed children" (Id. at 82). And further, "children's services lack continuity and comprehensiveness" (Id. at 41). Since "34% of persons in need of mental health services are young people (ages 0-17)" the gravity of this problem is readily apparent (Id. at 42). Clearly, Idaho presently lacks, but needs, sufficient in-patient treatment facilities for emotionally disturbed youth. See deposition of James Antram, pages 39-46.

RESPONSE: Admitted as to facts in 1979.

* * *

45. The reason the psychological conditions of named and class plaintiffs have not significantly improved, or have deteriorated, is the lack of a sound, coordinated sys-

tem of appropriate mental health services delivered in the setting least restrictive of personal liberty with the goal of providing the plaintiffs an opportunity to develop their full potential.

RESPONSE: Denied.

46. The records of Jeff D., a named plaintiff who has been placed at Youth Services Center and State Hospital South, on October 22, 1981, in a "Progress Report" which was prepared by defendants, clearly states that:

> *Treatment Observations:* On 7-22-81 Jeff peaked in his number of reports which have shown a steady, erratic decline since. Jeff has been in Sawtooth 43 weeks with only 16 of those weeks above average grades. Jeff is generally non-motivated due to a lack of viable community resources. He has recently (2 weeks) improved his school work and cottage behavior. He is presently on Phase I and will be on Phase II next week.
>
> • • •
>
> *Comments:* Jeff has been here since 11-28-80. During the past 11 months I have seen minimal change in Jeff. He has almost no motivation to change and I feel his needs could best be met in some other type facility. He continues to need structure but also needs to be able to learn some work skills.

RESPONSE: Admitted that the Progress Report contains the statement.

47. A part of this problem can be referred to as "institutionalization" of present and is described by James Antram, on pages 146-147 of his deposition, as follows:

> "I do believe that there is a phenomenon of institutionalization where people, as in any other circumstance, you will adjust to your immediate environ-

ment, and adjustment to that environment may not transfer and generalize well to another environment so that you may have difficulty adjusting in a different environment, and I see that happening in our institutions. They are contrived environments and are not necessarily consistent with the kind of environment that the person may be moved into after their phase of hospitalization, and the longer the person is in the facility, the more apt for that phenomenon to occur."

RESPONSE: Admitted.

48. On September 4, 1980, a hearing was held in the District Court of the Seventh Judicial District of the State of Idaho, In and For the County of Bingham, Magistrate Division, In the Matter of the Hospitalization of Mark Clary, Intervenor herein. At that hearing, Intervenor Clary was found by both (all) expert witnesses (designated examiners) to be not commitable: not likely to injure himself or others and not in need of care at an inpatient psychiatric facility (like State Hospital South). Therefore, the Court ordered that Intervenor Clary:

A. Be released from the care and custody of State Hospital South as soon as possible to less restrictive alternative setting (e.g., intermediate care facility, halfway house, shelter home, etc.)

B. Have an after-care plan prepared by the Idaho State Department of Health and Welfare immediately to facilitate the Conditional release of Petitioner to a less restrictive setting.

C. Have appropriate education provided in a less restrictive setting than State Hospital South, to the end that Mark Clary graduate from high school.

Copies of this Court Order are attached as Appendix B to Intervenor's Complaint on file with this Court. Mark was subsequently released from State Hospital South to the custody of his father, Frank Clary, in the community.

RESPONSE: Admitted, denied that the Court had jurisdiction to enter the full scope of the order.

49. The community placement and services offered in the community to plaintiffs Jeff D. and Mark Clary were and are insufficient, inappropriate and unsatisfactory.

RESPONSE: Denied, Health and Welfare Defendants "placed" neither plaintiff in the community and do not know what services were provided by others.

50. The legal authority under which a juvenile person is committed to the defendants' custody (whether by Youth Rehabilitation Act, Child Protective Act, or Mental Health Act) is irrelevant to the person's need for treatment and training, and the treatment facilities and services that should be provided to the person.

RESPONSE: Admitted as to the need for services, denied as to the duty to provide services.

51. The North Idaho Childrens Home, even if opened and operated fully, cannot serve the needs of all the named and class plaintiffs.

RESPONSE: Admitted.

52. The "administrative policy" by which defendants allegedly prohibit the admission of juveniles to adult psychiatric hospitals:

A. Does not prohibit the placement of *all* children under age eighteen (18) with adults (including child molesters).

B. Was established as a result of this litigation.

C. Has not prevented totally the placement of children under age eighteen (18) with adult mentally ill persons, at State Hospital South and otherwise.

D. Could be changed at any time, in defendants' discretion.

RESPONSE: Admitted, denied as a result of this litigation.

53. There are presently insufficient facilities and services for the care, treatment and training of the plaintiffs and the class they represent.

RESPONSE: Admitted, there will always be a need for additional resources.

54. The plaintiffs' claim under the State Development Disabilities Act (Idaho Code §39-4601, et seq.) has been substituted for a claim under the Federal Development Disabilities Act (42 USC §6010 et seq.), since the Federal D.D. Act has been interpreted to grant few rights. The Federal and State Acts are somewhat similar though different services are mandated under each.

RESPONSE: Denied.

55. The plaintiffs' claim under the State Development Disability Act (Idaho Code §39-4601, et seq.) is purely legal in nature and not dependent on any extraneous set of facts; no motion to amend plaintiffs' complaint is necessary since these issues have been tried by consent

of the parties. This has expressly been done by the third circuit in *Halderman v. Pennhurst,* — F.2d —, 50 L.W. 2539 (February 26, 1982).

RESPONSE: Denied.

56(a). The defendants' own Concise Statement of Material Facts filed with their summary judgment motion states clearly that Jeff D., Paula E., and John M. all suffer from "mild *mental retardation.*" As defendants so aptly point out in their brief, the State D.D. Act applies only to those who are "developmentally disabled" and I.C. §39-4604(2) expressly defines a "developmentally disabled" as "attributable to an impairment, such as *mental retardation . . .*"

RESPONSE: Admitted.

56(b). Defendants' assertion that the State D.D. Act does not apply to plaintiffs is difficult to understand and incorrect.

RESPONSE: Denied.

57(a). The care and treatment of the mentally ill and the mentally retarded is different. However, both groups are entitled to reasonable care and treatment.

RESPONSE: Admitted.

* * *

58. The well reasoned *Woods v. Idaho State Department of Health and Welfare* decision courageously implemented the Idaho Development Disability statute to protect a helpless mentally disabled Idahoan. This court should do the same in this situation. *Halderman v. Pennhurst,* — F.2d —, 50 L.W. 2540-2541 (2/16/82).

RESPONSE: Denied.

59. There are at least three sub-classes involved in this litigation. These are:

a. Those children plaintiffs who do not receive any specialized or appropriate mental health care, treatment or training in highly restrictive adult psychiatric wards (such as State Hospital South and State Hospital North.)

RESPONSE: Admitted.

b. Those children plaintiffs who receive some specialized or appropriate mental health care, treatment and training; but reside in out of state placement settings, which are restrictive of the contacts and personal liberty in Idaho.

RESPONSE: Denied on the basis that Health and Welfare Defendants are unable to identify the group involved.

c. Those children plaintiffs who receive some specialized or appropriate mental health care, treatment and training in community based treatment facilities in Idaho.

RESPONSE: Admitted.

60. The actions alleged in admission number 59 exclude and deny plaintiffs programs solely on the basis of their handicap. As such, the defendants have violated the provisions of 29 USC §794.

RESPONSE: Denied.

61. The named and class plaintiffs have the right to reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, and minimally adequate or

reasonable training by qualified professionals to ensure safety and freedom from undue restraint.

RESPONSE: Admitted, subject to qualifications in *Youngberg v. Romero,* (1982) — U.S. —, 73 L.Ed. 2d 28.

62. The state also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. And it may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training. In this case, therefore, the state is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraint or the likelihood of violence.

RESPONSE: Admitted that is a correct statement of part of the decision in *Youngberg.*

63. The defendants have breached their duty to plaintiffs and have failed to provide reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, and minimally adequate or reasonable training by qualified professionals to ensure safety and freedom from undue restraint.

RESPONSE: Denied.

64. The named plaintiffs and class they represent have property and liberty interests, secured under state and federal law, to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and

with the goal of providing these plaintiffs with an opportunity to develop their full potential.

RESPONSE: Admitted to the extent of available resources, facilities and services.

65. The defendants have failed to provide to plaintiffs a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to plaintiffs needs, and with the goal of providing these plaintiffs with an opportunity to develop their full potential. There have, in fact, been cases of physical, sexual and other abuse of the plaintiff class.

RESPONSE: Denied.

* * *

DATED this 7th day of October, 1982.

/s/ James Wickham
Deputy Attorney General
Attorney for
Health and Welfare Defendants

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. Civ. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

v.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

AMENDED ANSWER

(Filed November 1, 1982)

I.

Defendants John V. Evans, Thomas L. Purce, George Bachik and Carroll Elmore, respond to the Class Action Complaint for Declaratory and Injunctive Relief as follows:

1. Said Defendants deny each and every allegation, together with each and every inference and conclusion derived therefrom, not specifically admitted herein.

2. Said Defendants admit the allegations contained in paragraphs 8, 9, 10, 11, 12, 13, 16, 38, 43, 50, 59, 60, 61, 62, 63, 64, 66, 67, 69, 75, 76, 83, 85, 89 and 90.

3. Said Defendants admit the allegations contained in paragraphs 4, 5, 6, 7, 17, 18, 22, 23, 28 and 30 as to facts existing when the Complaint was filed.

4. In response to paragraph 27, said Defendants admit, as to facts existing when the Complaint was filed that Plaintiff John M. is a fifteen year old boy who has been diagnosed as a child with emotional problems, possible mental retardation, has experienced problems caused by anti-social behavior, and has been placed in special education classes and community residential programs.

5. In response to paragraph 31, said Defendants admit that Plaintiff Dusty R. was admitted to State Hospital South in Blackfoot, Bingham County, State of Idaho, in May, 1980.

6. In response to paragraph 36, said Defendants admit that most plaintiffs suffer from treatable conditions which could be improved by appropriate treatment and educaton; said Defendants allege that the ameniability to treatment must be assessed on an individual basis in light of available services.

7. In response to paragraph 39, said Defendants admit that some plaintiffs are or will be placed in facilities in Idaho under contract to the Idaho Department of Health and Welfare.

8. In response to paragraph 40, said Defendants admit that some plaintiffs will be placed in State Hospital South in Blackfoot, Bingham County, State of Idaho, and will come into contact with those being treated as criminal offenders (i.e. those who are being evaluated, unfit to stand trial or have been acquitted of a crime on grounds

of mental disease or defect under Idaho Code, Sections 18-211, 18-212 or 18-214, respectively.)

9. In response to paragraph 48, said Defendants admit that the named Plaintiffs and the class they seek to represent have property and liberty interests, secured under state and federal law to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and with the goal of providing these Plaintiffs with an opportunity to develop their full potential; however, said Defendants allege that "soundness" and "coordination" vary with each state or federal law granting any such right and that "appropriateness" "restrictiveness" and "full potential" must be determined on a case-by-case basis; further, said Defendants deny that any such rights or interests impose a duty other than to provide services in available facilities by available staff within the scope of the staff's authorized practice and within available resources.

10. In response to paragraph 70, said Defendants admit that under the Developmental Disabilities Assistance and Bill of Rights Act, "developmental disability" means a disability of a person which is attributable to mental retardation or any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such persons.

11. In response to paragraph 72, said Defendants admit to said allegations but deny any duty other than to

provide services in available facilities by available staff within the scope of staff's authorized practice and within available resources.

12. In response to the allegations contained in paragraphs 77, 78 and 79, said Defendants generally admit said allegations but deny that the Act creates any rights in Plaintiffs and that Defendants have violated any of the Act's requirements and allege that the Act has been repealed.

II.

Defendants John V. Evans, Thomas L. Purce, George Bachik and Carroll Elmore respond to Intervenors' Complaint as follows:

1. Said Defendants incorporate the reference their foregoing Amended Answer and their Intervenor's Complaint dated February 2, 1981.

III.

Defendants John V. Evans, Thomas L. Purce, George Bachik and Carroll Elmore move to dismiss the Complaint for failure to state a claim upon which relief can be granted and for lack of jurisdiction pursuant to the Eleventh Amendment of the United States Constitution.

WHEREFORE Defendants pray that Plaintiffs take nothing by way of their Complaints, that Defendants be awarded their costs and attorney's fees incurred herein, and for such other relief as the Court deems proper.

DATED this 27th day of October, 1982.

/s/ James Wickham
Deputy Attorney General
Attorney for
Health and Welfare
Defendants

/s/ Thomas C. Frost
Deputy Attorney General
Attorney for John V. Evans

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

(Title omitted in printing)

MOTION FOR CONSIDERATION OF COSTS AND ATTORNEY FEES ON SETTLEMENT

(Filed April 4, 1983)

The plaintiff class, by and through their attorney of record, hereby moves the above entitled court to allow consideration of costs and attorney fees in the settlement of this matter.

This motion is based on the pleadings, discovery and other documents on file in this matter. This motion is further based on the Stipulation settling mental health claims and Order on file in this matter, and the oral stipulations submitted at the Pre-Trial Hearing in this matter held on March 22, 1983.

WHEREFORE, plaintiffs move that the above entitled court:

(1) Approve the agreed upon settlement in this matter except for the provision on costs and attorney fees; and

(2) Allow plaintiffs to present a cost bill (with attorney fees) for consideration by the court.

DATED this 31st day of March, 1983.

/s/ Charles Johnson, III
JOHNSON AND OLSON,
CHARTERED
303 Spaulding Building
Pocatello, Idaho 83204

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

(Title omitted in printing)

Reporter's Transcript of Proceedings held in the above-entitled action before the HONORABLE MARION J. CALLISTER, United States District Judge, District of Idaho, sitting without a jury commencing at 1:30 p.m., on Thursday, April 28, 1983, at Pocatello, Idaho.

APPEARANCES

For Plaintiffs:	For Defendants:
L. CHARLES JOHNSON, III Post Office Box 1725 Pocatello, Idaho 83204	JAMES WICKHAM Deputy Attorney General 450 West State, 7th Floor Boise, Idaho 83720

POCATELLO, IDAHO,
THURSDAY, APRIL 28, 1983, 1:30 P.M.

THE CLERK: Cause No. Civil 80-4091, Jeff D., et al., versus John V. Evans, et al., for hearing.

THE COURT: Counsel, I have considered your briefs. I will hear your argument.

You may proceed.

MR. JOHNSON: Thank you, Your Honor. If it may please the Court, this matter came up for a pretrial conference on March 22nd of last month.

At that time the State of Idaho tendered a settlement proposal which for the first time proposed that all emotionally disturbed children under age 14 be segregated from all adult mental patients, and from age 14 to 18 they could only be kept with adult mental patients for a period of up to 45 days while a substitute facility was found,

with one 45-day extension allowed in cases where a prior placement had proved to be unsuccessful.

Furthermore, all these children from 14 to 18 ought to be segregated from all people with a history of being child molesters.

At that time the plaintiff class, on behalf of myself, accepted that proposal, since it was substantially the relief we had asked for in the complaint. However, at that time I was under direct instructions from my employer on contract, Idaho Legal Aid Services, not to negotiate attorney's fees. At that time, then, I conditioned the settlement on court approval of the attorney's fees waiver.

I have, subsequent to that time, a week later pursuant to court instruction for further briefing, made a motion for approval of this settlement as it was outlined by the state and myself and the plaintiff class, and further for an award of costs, including attorney's fees, pursuant to the attorney's fees statute, 28 USC Section 1988.

The attorney's fees statute, as His Honor is aware, was passed in order to provide access to justice for individuals without financial means who hire an attorney to protect their rights. I think the brief that I have written that has been considered by the Court speaks for itself on the reasons this statute was enacted.

I think also the Federal District Court of Massachusetts in Brewster versus Dukakis, which is cited in my brief, came to the conclusion that these awards of attorney's fees were necessary in order to provide an advocacy system for people such as the plaintiffs in this class who were subject to incarceration by the state. In that case

the Court made an award of attorney's fees in order to set up such an advocacy system.

Although it's not in my brief, it's a matter of record that I have since left the employment of Idaho Legal Aid on a full-time basis. I am employed by them on a part-time basis and I am in private practice the rest of the time, primarily because of funding cuts and other restrictions in the Legal Aid Act.

Because of these funding cuts, the access to justice for these individuals is less than it was 18 months ago.

On the ethical question, I think that the case of Mendoza versus United States, which is a Ninth Circuit case in 1980, is most directly to the point on this issue, and the Court, as I'm sure, has read my brief on this issue, but the Court said that specifically that they don't believe that the potential conflict between a person's clients, an attorney's clients, and the attorney's vested interest disappears simply because there are no funds or money damages being negotiated.

In other words, an attorney like myself can be put in the position of either negotiating for his client or negotiating for his attorney's fees, and I think that that is pretty much the situation that occurred in this instance.

I was forced, because of what I perceived to be a result favorable to the plaintiff class, a result that I didn't want to see jeopardized by a trial or by any other possible problems that might have occurred. And the result is the best result I could have gotten in this court or any other court and it is really a fair and just result in any instance and what should have occurred years earlier and

which in fact should have been the case all along. That result I didn't want to see disturbed on the basis that my attorney's fees would cause a problem and cause that result to be jeopardized.

Therefore, I presented the settlement to the court at that time because it is at just and fair settlement to the plaintiffs and left the attorney's fees and costs to be determined at a later date, and I have submitted that to the Court now in this motion, and under Rule 23(c)[(e)] of the Federal Rules of Civil Procedure, the Court may, of course, accept the settlement or a part thereof, and since the attorney's fees in that settlement were specifically left for further discussion by the Court, I would submit that the Court has the power under Rule 23(c)[(e)] clearly to approve the settlement and to allow Idaho Legal Aid Services to present a cost bill which would include attorney's fees for consideration by the Court, and then if the Court so desired, to strike what portions of that cost or attorney's fees bill it deemed appropriate under the circumstances.

What we are really asking for, Your Honor, is a chance merely to submit the cost bill for the Court's consideration.

On Page 4 of the state's brief it states that instead that the agreement negotiated, "is simply an agreement of both parties to waive their right to attorney's fees," and we specifically tried to make it clear that I wasn't trying to waive any rights to attorney's fees, but instead to leave that for the Court to consider at a later date.

And that's really all we are asking for, is under Federal Rule of Civil Procedure 23(c)[(e)] a chance to sub-

mit those attorney's fees for consideration by the Court, but in any case, on behalf of the plaintiff class, I would like to request that that stipulation become the order of the Court and that we be allowed to submit our attorney's fees if the Court deems it appropriate.

Thank you.

THE COURT: Do you wish to reply, Mr. Wickham?

MR. WICKHAM: As the Court will recall, the last time we met the parties tendered a stipulation settling the remaining issues to the Court for its consideration, and as you are aware, it contains a provision that the parties will bear their attorney's fees incurred.

We stipulated at that time that the tender of settlement was conditioned on approval of the Court of that item, and further that the Court would be guided in deciding to approve the settlement on whether it was ethical or unethical to bargain away a claim for attorney's fees.

I believe the recent Ninth Circuit cases that are referred to in my brief clearly enunciate the standard that the Court can use in deciding to approve the settlement, namely whether it was taken as a whole and a fair and reasonable resolution of the matter.

I have also presented to the Court authorities suggesting that it was not unethical to bargain the issue of attorney's fees, and on the basis of those and the agreement stated in my brief, I would ask the Court to approve the tendered settlement.

THE COURT: Well, I have already given this matter some thought, and I am just going to rule from the bench.

As I look at the cases that are there, the ethical consideration is "Is the attorney in the process of bargaining out to depreciate his client's claim or to proceed in a manner that will be unfair to his client?" And I think the ethical considerations run only to the issue and not to the issue of what is fair to the attorney, and therefore I am of the opinion that it doesn't violate any ethical considerations for an attorney to give up his attorney fees in the interest of getting a better bargain for his client.

The last time when we were considering this — I know attorneys can't be expected to do that very often and it's comforting to find an attorney that will do that sometimes occasionally — but when we discussed this, as I got the viewpoint, the state was not willing to concede that they were obligated to do the things that they were doing and that they were being required to do them by this action, but they were willing to do them as long as their costs were outlined and they didn't face additional costs, but they indicated that they only submitted upon the stipulation that there would be no attorney's fees paid.

My viewpoint is that they are in a position to say, if I say attorney's fees will be allowed, to withdraw the stipulation and put us to trial, and I think, considering all of the factors and all that has been accomplished and the fact that the negotiation has been made on that basis that the clients have been treated very fairly and there

has been no unethical conduct on the part of the parties, that I'm going to approve the settlement without attorney's fees and costs.

Thank you both, gentlemen. I will sign the stipulated order today.

MR. WICKHAM: Will the parties be receiving a copy of the executed order?

THE COURT: I don't know whether you submitted any to be sent out or not.

MR. JOHNSON: We submitted only one copy at the time of the settlement, Your Honor. I have an extra copy.

THE COURT: I can have the clerk make copies. If you have copies, it would be very helpful, because he could stamp those and you could have them.

Do each of you have a copy?

MR. WICKHAM: Yes.

THE COURT: I have signed this, and if you want to leave those with the clerk, he will stamp those and return them to you.

Thank you, gentlemen.

(The proceedings in this matter were concluded at 2:00 p.m. this date.)

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(Reporter's Certificate Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CIV 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and MARK CLARY, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

STIPULATION SETTLING MENTAL HEALTH CLAIMS and ORDER

(Filed April 28, 1983)

Plaintiffs and Defendants John V. Evans, Thomas L. Purce, George Bachik and Carroll Elmore (hereinafter: "defendants"), through their respective counsel of record, hereby stipulate to settle the remaining mental health claims upon the following terms:

I

Plaintiffs have the right to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their

needs, with the goal of providing them the opportunity to develop their full potential.

Defendants have the duty, so far as possible, through procedures, agreements, contracts and policies, of ensuring an available, accessible continuum of alternative community-based treatment facilities and residential programs providing mental health services to plaintiffs in the setting least restrictive of personal liberty on a statewide basis.

II

To achieve the goals of Division I, above, defendants shall:

1. Undertake on an annual basis a program of planning for the service programs administered by the Division of Community Rehabilitation of the Idaho Department of Health and Welfare, including Community Mental Health, Adult and Child Development and Institutional programs. Each individual planning effort shall be coordinated with the others and shall assess the needs of plaintiffs within each program, identify services and facilities which need to be developed or modified to address such needs, and establish an implementation plan of priorities and resources available or required to satisfy such needs. A copy of all such plans shall be submitted to counsel for plaintiffs.

2. With all deliberate speed, seek to establish such facilities and programs identified as necessary and appropriate under Paragraph II(1) for the provision of mental health services to plaintiffs in the most normal living conditions in Idaho.

3. The organizational unit(s) of the Idaho Department of Health and Welfare having programmatic responsibility for services to plaintiff's shall annually submit a legislative budget request for funds for the operation of community-based treatment facilities and residential programs and the development of such additional facilities and programs identified as necessary and appropriate under Paragraph II(1) to serve the needs of plaintiffs. Until such time as other private or governmental agencies develop and operate community facilities and programs sufficient to meet the needs of plaintiffs identified under Paragraph II(1), defendants shall accept responsibility for the development and operation, within the limits of resources of or available to defendants, either directly or in conjunction with other providers, of such facilities and programs.

4. Defendants shall prohibit the admission of plaintiffs to any psychiatric treatment unit of the Idaho Department of Health and Welfare where there is contact as to living and sleeping arrangements with adult mental patients, provided that plaintiffs in the following circumstances may be so admitted (subject to the protections in Paragraph II(5)):

4a. Judicial proceedings for the involuntary commitment of a plaintiff have been commenced under Section 66-329, Idaho Code, and (i) the court in such proceedings enters an order for temporary detention under Section 66-329(e), Idaho Code, (ii) the court in such proceedings determines that admission to such a facility is necessary for the protection of the plaintiff, (iii) no less restrictive alternate facility is available to the court or

appropriate under the circumstances, and (iv) the admission under this exception does not extend past the time the plaintiff is dispositioned to an appropriate treatment facility or dismissal of the proceedings; or

4b. Jurisdiction under the Youth Rehabilitation Act has been waived pursuant to Sections 16-1806 or 16-1806A, Idaho Code, the plaintiff has been charged with a criminal offense and proceeded against as an adult, and is committed pursuant to Section 18-211 or 18-212, Idaho Code; or

4c. The plaintiff suffers from a mental disorder which, in the opinion of a psychiatrist, is amendable to treatment at such facility, such facility is closer to the plaintiff's home than another appropriate, available facility, and such admission does not extend for more than forty-five (45) days; or

4d. The plaintiff has been committed pursuant to Section 66-329, Idaho Code, has a history of placements in more than one residential facility with a program of services designed for children or adolescents and such placement has not benefited the the plaintiff or no other appropriate facility is available and such admission does not extend for more than forty-five (45) days, provided that such admission may continue for one (1) additional forty-five (45) day period for the purpose of placement in an alternate facility; or

4e. The Idaho Department of Health and Welfare develops a psychiatric treatment unit for plaintiffs in which plaintiffs are separated from adult mental patients with respect to living and sleeping arrangements.

5. The exceptions of Paragraph II(4) notwithstanding, (i) no plaintiffs under the age of fourteen (14) years may be admitted under exceptions II(4)(a), (b), (c) or (d) to any such facility; and (ii) nor may any plaintiff be placed on a unit with an adult mental patient with a history of sexual activity as an adult with a minor.

6. The Idaho Department of Health and Welfare shall organize and utilize an interdisciplinary intra-agency committee composed of representatives of its mental health, developmental disabilities, social services and field operations programs to review the proposed admission of plaintiffs to any psychiatric treatment until of said Department where there is contact with respect to living and sleeping arrangements with adult mental patients under exception II(4)(d). The committee shall review the proposed admission, alternative placements, the plaintiff's need for inpatient care and determine that such admission is the most appropriate available placement for such plaintiff.

7. The Administrative Director of any psychiatric treatment unit of the Idaho Department of Health and Welfare in which there is contact with respect to living and sleeping arrangements with adult mental patients shall notify counsel for plaintiffs or his successor as reflected in the records of the above-entitled action of the admission of each plaintiff under exceptions II(4)(a), (c), or (d) and extension of any admission under II(4)(d). The notification shall include the plaintiff's name and date of birth, the name and address of the plaintiff's parent(s), guardian(s) or other person(s) acting in loco parentis, other facilities considered prior to such admis-

sion and the name and address of the official to contact concerning the admission.

8. All placements of plaintiffs shall be in the environment least restrictive of personal liberty in which appropriate services can be provided with a perference for (i) placement in the plaintiff's home and (ii) placement in a psychiatic treatment unit in which there is contact with respect to living and sleeping arrangements with adult mental patients only after all other appropriate placements have been attempted or considered and rejected.

9. The defendants shall provide plaintiffs with appropriately prescribed mental health services according to each plaintiff's individual treatment plan, including, where appropriate, diagnosis, evalution, therapy and counselling. Service and decisions concerning services shall be provided or made by professions qualified by education, training or experience to make the particular decision or provide the particular service involved. Treatment decisions concerning plaintiffs admitted to a psychiatric treatment unit of the Idaho Department of Health and Welfare must be made by professionals experienced in providing such services or making such decisions in the psychiatric setting; provided that day-to-day decisions regarding the care of such plaintiffs—including decisions that must be made without delay—may be made by other persons if such other persons are subject to the direct supervision of a qualified professional and each such decision is reviewed by a qualified professional.

10. For each plaintiff, defendants shall develop an individualized treatment or service plan, which, in the

case of plaintiffs admitted to an inpatient psychiatric treatment unit, shall meet the requirements of "Rules Governing Hospitals", Title 2, Chapter 1, Rules and Regulations of the Department of Health and Welfare.

11. Defendants shall provide adequate psychiatric, psychological or other counseling and programming, as considered appropriate in light of each plaintiff's individual treatment plan, including at least five (5) hours of therapy or other direct services per week.

12. In developing and implementing the individual treatment plans, defendants shall include the least possible reliance on medications appropriate under the circumstances.

13. The Administrative Directors of each psychiatric treatment unit of the Idaho Department of Health and Welfare shall keep records containing a description of any extraordinary incidents (including sexual incident, physical attacks, threats or accident) in such facility involving any plaintiff. Each report must be prepared by a staff member noting personal knowledge of the incident or other source of information. The Administrative Director shall investigate each report. Modifications to the individual treatment plan of each plaintiff involved in each such report must be considered following verification of a report.

14. Upon verification of an incident report, the Administrative Director of each psychiatric treatment unit of the Idaho Department of Health and Welfare shall take the necessary steps to protect such plaintiff from recurrence of such incident.

15. With respect to plaintiffs admitted to an inpatient psychiatric treatment unit, other than one of the Idaho Department of Health and Welfare, in which there is contact with respect to living and sleeping arrangements with adult mental patients, an employee of such department shall be responsible for the monitoring of the care and progress of each such plaintiff. In preparing reports regarding such plaintiff, either pursuant to Paragraph II(20) below or Section 66-337, Idaho Code, such employee shall review all extraordinary incidents (including sexual incidents, physical attacks, threats or accidents) involving the plaintiff, include a description of any such incident in such report, consider modifications to the plaintiff's treatment or service plan or a change in placement as may be necessary to protect such plaintiff from recurrence of such incident.

16. The individual treatment plan of each plaintiff admitted to a psychiatric unit of the Idaho Department of Health and Welfare shall be developed upon admission and reviewed as needed but at least once every six (6) months or upon verification of an incident report. The review shall be conducted either by the facility's quality assurance committee, which committee must include at least one (1) qualified professional with at least two (2) years' clinical experience in the treatment of children or adolescents, or by an interdisciplinary committee appointed by and reporting to the Administrative Director, the members of which committee must have at least two (2) years' clinical experience in the treatment of children or adolescents.

17. In the event any plaintiff admitted under the exceptions contained in Paragraph II(4) has exhausted

the programs and treatment resources available through the Idaho Department of Health and Welfare and such plaintiff's clinical condition does not improve or deteriorates in any six (6) month period, the Administrative Director of the facility shall refer such plaintiff to a licensed psychologist or psychiatrist specializing in children's or adolescent's treatment or such other professional specializing in an area appropriate to such plaintiff's condition for additional case consultation.

18. Each individual treatment or service plan contain a placement assessment. The placement assessment must identify the least restrictive environment most capable of meeting the needs and capabilities of such plaintiff. If the plaintiff is not placed in such environment, the plan must reflect why the plaintiff was not so placed.

19. Each individual treatment plan of a plaintiff admitted to an inpatient treatment facility must include a discharge plan. The discharge plan must include a projected date for the transfer, release or discharge from such facility and the programming necessary to achieve such result.

20. The parent(s), guardian(s) or other person(s) acting in loco parentis of each plaintiff must be notified on at least a semi-annual basis of their plaintiff's vocational, social, living skills, progress and clinical condition.

21. State Hospital North, State Hospital South, and any other inpatient psychiatric treatment unit of the Idaho Department of Health and Welfare shall establish in consultation with plaintiffs' counsel (see below) and implement a patient grievance procedure. Such procedure shall be available to each plaintiff and his or her

parent(s), guardian(s) or other person(s) acting in loco parentis, and provide a method for the plaintiff or such other person to disagree with the individual treatment plan or its implementation.

22. Each plaintiff's individual treatment plan must be separate from and coordinated with such plaintiff's individual education plan.

23. At least once each year so long as the court retains jurisdiction of this matter, counsel for plaintiffs, counsel for defendants and the Administrator of the Division of Community Rehabilitation of the Idaho Department of Health and Welfare shall meet and confer concerning defendants' implementation of this Stipulation and any other items of concern to plaintiffs.

24. The court may retain jurisdiction over this matter for five (5) years or until satisfied by stipulation or otherwise that the claims for relief as alleged in the Complaint herein have been adequately addressed.

25. Plaintiffs and defendants shall each bear their own costs and attorney's fees thus far incurred, if so approved by the Court.

26. This Stipulation may be merged into a judgment of the court fully resolving the above-entitled action.

DATED this — day of March, 1983.

/s/ James Wickham
Deputy Attorney General
Attorney for Health and
Welfare Defendants

Welfare

DATED this — day of March, 1983.

/s/ Thomas C. Frost
Deputy Attorney General
Attorney for Defendant
John V. Evans

DATED this — day of March, 1983.

/s/ L. Charles Johnson, III
Attorney for Plaintiffs

ORDER

IT IS SO ORDERED.

/s/ Marion J. Callister
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

ORDER DENYING ALL COSTS

(Filed May 9, 1983)

The above-entitled matter came on for hearing on April 28, 1983, in Pocatello, Idaho, on plaintiffs' motion for consideration of costs and attorney fees on settlement in the above-entitled action. This action was settled by a stipulation, settling mental health claims, which was approved by (and became the order of) this Court on April 28, 1983. The stipulation provided that each party "shall bear their own costs and attorney fees thus far incurred, if so approved by the Court."

For good cause shown, and based on the Stipulation Settling Mental Health Claims, and other pleadings, docu-

ments and papers on file in this matter, and for the further reasons stated at the hearing on the motion for attorneys fees, IT IS ORDERED that the plaintiffs' motion for consideration of costs and attorney fees on settlement be, and the same is hereby, DENIED.

DATED this 6th day of May, 1983.

/s/ Marion J. Callister, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CIV 80-4091

(Title omitted in printing)

NOTICE OF APPEAL

(Filed May 26, 1983)

NOTICE IS HEREBY GIVEN that plaintiffs above named hereby appeal to the United States Court of Appeals for the Ninth Circuit from the "Order Denying All Costs" in this action dated May 6, 1983.

/s/ Charles Johnson, III
JOHNSON AND OLSON,
CHARTERED
303 Spaulding Building
Pocatello, Idaho 83204
Lawyer for Plaintiff

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. Civ. 80-4091

(Title omitted in printing)

MOTION TO SUSPEND PERFORMANCE OF STIPULATION PENDING APPEAL

(Filed June 3, 1983)

Health and Welare Defendants move for an order suspending their duties under the Stipulation Settling Mental Health Claims and Order entered April 28, 1983 on the grounds:

1. On or about March 22, 1982, said Defendants conditionally tendered said Stipulation, such Stipulation being that the parties would bear their own costs and attorney's fees thus far incurred.

2. Upon tendering said Stipulation, the parties further stipulated in open court that the Court was to resolve the issue whether it is ethical for the parties to negotiate the issue of attorney's fees and costs concurrently with negotiations on the merits and further stipulated that should the Court conclude such bargaining was ethical that said Stipulation would be tendered as submitted (with the waiver provision).

3. Thereafter, following briefs and argument, on April 28, 1983, the Court held that it was ethical for the parties to concurrently negotiate the merits and attorney's fees, and that the tendered Stipulation was fair and equitable.

4. Pursuant to the Stipulation, on May 6, 1983, the court entered an order denying plaintiff's costs and attorney's fees.

5. On or about May 26, 1983, plaintiffs' filed a Notice of Appeal regarding the denial of attorney's fees and costs.

6. Said appeal has the effect of revoking plaintiff's tender of the Stipulation Settling Mental Health Claims and Order.

7. Said appeal should estop plaintiffs' from enforcing the Stipulation Settling Mental Health Claims and Order during the pendency of the appeal.

8. Health and Welfare Defendants' duties under the Stipulation Settling Mental Health Claims and Order should be suspended during the pendency of the appeal.

WHEREFORE Health and Welfare Defendants pray for an order suspending performance of their duties under the Stipulation Settling Mental Health Claims and Order while the appeal is pending.

DATED this 31st day of May, 1983.

/s/ James Wickham
Deputy Attorney General
Attorney for
Health and Welfare Defendants

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. Civ. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their oficial capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

ORDER

(Filed August 12, 1983)

The parties having stipulated to resolve the remaining mental health claims, having further stipulated that should the Court conclude that it is ethical for attorneys admitted to practice before this Court to negotiate a waiver of attorneys fees and costs concurrently with the merits of the claims that the stipulation would be tendered for consideration by the Court with a waiver provision, and the Court having concluded that the practice is ethical, having approved the settlement stipulation and having denied the plaintiffs' request for attorney's fees and costs and the plaintiffs' having appealed said denial, and

it appearing to the court that suspension of the stipulation pending appeal is necessary to preserve the expectations of the parties while the appeal is pending;

IT IS HEREBY ORDERED that Health and Welfare Defendants' duties under the Stipulation Settling Mental Health Claims and Order entered April 28, 1983 be and the same are hereby suspended while said appeal is pending.

DATED this 10th day of August, 1983.

/s/ Marion J. Callister
District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

(Title omitted in printing)

MOTION FOR RELIEF FROM STAY

(Filed August 29, 1983)

The plaintiff class, by and through their attorney and next friend, hereby moves the above entitled Court for relief from the suspension (stay) of the "Stipulation Settling Mental Health Claims and Order" in the Court's order dated August 10, 1983. This motion is made pursuant to Federal Rule of Civil Procedure 62 and Appellate Rule 8.

The relief from stay requested is that the "Order" dated August 10, 1983, be rescinded and nullified; and that the Stipulation Settling Mental Health Claims and Order entered April 28, 1983, be made final in all respects.

This motion is based on the pleadings, depositions, interrogatories, and other papers on file in this matter, including the motions, briefs, affidavits, factual statements and summary judgment papers on file herein. This motion is also supported by the attached brief.

DATED this 26 day of August, 1983.

/s/ Charles Johnson
JOHNSON AND OLSON,
CHARTERED
303 Spaulding Building
Pocatello, Idaho 83204

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

—vs—

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

ORDER

(Filed September 6, 1983)

Plaintiffs having filed a motion for relief from stay, and the Court having reviewed the file and the brief in support of said motion.

NOW, THEREFORE, IT IS ORDERED that the motion for relief of stay be, and the same is hereby, DENIED.

DATED this 6th day of September, 1983.

/s/ Marion J. Calister, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
District of Idaho
United States Court House
Box 040
550 W. Fort Street
Boise, Idaho 83724

Marion J. Callister
Chief Judge

September 6, 1983

Mr. Charles Johnson, III
Attorney at Law
P. O. Box 1725
Pocatello, Idaho 83204

Re: *Jeff D. et al v. Evans et al, Civil No. 80-4091*

Dear Mr. Johnson:

By way of explanation of my denial of your motion for relief from stay, the defendants' signing of the stipulation was dependent upon the Court's approval of the finding that it was appropriate to accept a stipulation where plaintiffs waived attorneys fees. The Court made that finding and signed the stipulation. You then appealed from this Court's finding. Obviously you are in a "Catch 22" situation. If the circuit court reverses this Court and finds that it is not appropriate, then the stipulation must be set aside as I advised you at the time it was accepted. The defendants entered into the stipulation only as a compromise matter with the understanding that they would not pay any attorneys fees, and advised the Court that if there were going to be attorneys fees that they wanted to proceed with trial because they did not think they were required to conform to the stipulation legally. Under those circumstances, it would be entirely inappropriate to leave the stipulation in effect. If you

effectively challenge the stipulation, the whole stipulation falls and the matter must be tried by the Court. On the other hand, if you do not successfully challenge the stipulation, then the stipulation and stay is in effect. But until the validity of the stipulation is determined, the Court feels it is entirely unfair to enforce it.

Very truly yours,

/s/ Marion J. Callister

cc: James Wickham
Deputy Attorney General

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

DC# CV 80-4091 MJC

Idaho (Pocatello)

JEFF D., PAUL E., JOHN M. AND DUSTY R., minors, individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs-Appellants,

vs.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellees.

ORDER

(Filed September 26, 1983)

Before: FLETCHER and NELSON, Circuit Judges

Appellants' emergency motion for stay or injunction pending appeal is granted. The district court's order suspending the parties' stipulation pending appeal is vacated. Pending the disposition of this appeal, the parties shall comply with their Stipulation Settling Mental Health Claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., MINOR, individually and on behalf of the class they represent, by and through their next friend, CHARLES JOHNSON,

Plaintiffs,

vs.

JOHN V. EVANS, MILTON G. KLEIN, JERRY EVANS, GEORGE BACHIK, and CARROLL ELMORE, individually and in their official capacities, their successors in office, title, and interests,

Defendants.

ORDER

(Filed October 22, 1984)

PURSUANT TO RULE 4(b), F.R.C.P., the period in which Defendants, John V. Evans, Rose Bowman (successor in office to Thomas L. Purce), George Bachik and William Gruzinski (successor in office to Carroll Elmore) shall respond to all matters which are now or may be pending in this Court shall be tolled until the latter of expiration of ninety (90) days after 1) entry of the mandate herein by the United States Court of Appeals; 2) denial of said Defendants' Petition for Writ of Certiorari in the Supreme Court; 3) remand of the matter to this Court after action by the Supreme Court; or 4) denial of said Defendants' Motion to Rescind Tender of Settlement, should they elect to so move.

DATED this 22 day of October, 1984.

Honorable Marion J. Callister
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

D.C. # CV 80-4091

MJC

(Dist[illegible] of Idaho)

JEFF D., PAUL E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clark, Intervenor,

Plaintiffs-Appellants,

vs.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellees.

O R D E R

(Filed November 6, 1984)

Before: SCHROEDER, FARRIS, and REINHARDT, Circuit Judges.

The Appellants' Second Emergency Motion for Stay for Injunction Pending Appeal is granted. The district court's order of October 22, 1984, is vacated. The parties shall comply with their Stipulation Settling Mental Health Claims.

Office-Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1288

In The

Supreme Court of the United States

October Term, 1984

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK and WILLIAM GRUZINSKI,
Petitioners,

v.

JEFF D., PAULA E., JOHN M., and DUSTY R., Minors, By and Through Their Next Friend, CHARLES JOHNSON, III, Individually and on Behalf of the Class They Represent and MARK CLARY, Intervenor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding it unethical for parties in civil rights class actions to negotiate a settlement on the merits simultaneously with a settlement of attorney's fees and costs.

2. Whether the Court of Appeals erred in enforcing the merits portion of the negotiated settlement while reversing the district court's approval of the attorney's fee waiver.

LIST OF PARTIES

Petitioner John V. Evans was sued in his official capacity as Governor and chief executive officer of the State of Idaho. Petitioner Rose Bowman is the successor in office to Milton G. Klein, sued in his official capacity as Director of the Idaho Department of Health and Welfare. Petitioner George Bachik was sued in his official capacity as Administrative Director of State Hospital South, an administrative unit of the Department of Health and Welfare. Petitioner William Gruzinski is the successor in office to Carroll Elmore, sued in his official capacity as Clinical Director of State Hospital South. Although included in the caption before the Court of Appeals, Defendant Jerry Evans, State Superintendent of Public Instruction, was not a party to the orders appealed and is not a petitioner herein.

Respondents, Jeff D., Paul E., John M. and Dusty R., sued individually and on behalf of children who, because of mental illness, have been admitted to treatment facilities of the State of Idaho. As minors, suit is brought on their behalf by their next friend, Charles Johnson, III, who was also their counsel of record before the District Court and Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
REFERENCE TO OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT:	
I. The Court Of Appeals Erred In Holding It Unethical For Parties In Civil Rights Class Actions To Negotiate A Settlement On The Merits Simultaneously With A Settlement Of Attorney's Fees And Costs	10
A. Simultaneous Negotiation Of The Merits And Of Attorney's Fees Is Not Inherently Unethical	10
1. The Attorney's Fees Awards Act Does Not Preclude Simultaneous Negotiations	12
2. Bar Opinions And Ethics Committee Reports Differ Over The Ethics Of Simultaneous Negotiations	15
3. Most Federal Circuits Have Rejected The Bifurcated Settlement Procedure	20
B. Bifurcation Of Negotiated Settlements Will Result In Unintended Consequences	23

TABLE OF CONTENTS—Continued

Page

1. A Ban On Simultaneous Negotiations Will Discourage Negotiated Settlements 24

2. Bifurcation Creates Pressure On Attorneys For Both Plaintiff And Defendant To Evade The Imposed Process, Leading To Enforcement Problems 29

C. Defense Counsel May, In Some Instances, Have An Ethical Right And Duty To Engage In Simultaneous Negotiations 31

D. District Courts Have The Necessary Tools To Uncover And Excise Unethical Conduct 34

II. The Court Of Appeals Erred In Enforcing The Merits Portion Of The Negotiated Settlement While Reversing The District Court's Approval Of The Attorney's Fee Waiver 39

A. The District Court Did Not Abuse Its Discretion In Approving The Settlement 39

B. The Court Of Appeals Erred By Forcing Petitioners To Abide By Their Settlement On The Merits While Directing The District Court To Award Attorney's Fees To Respondents On Remand 44

C. The Court Of Appeals Erred By Depriving The District Court Of Its Discretion To Award Or Deny Attorney's Fees On Remand 47

CONCLUSION 49

APPENDIX ..... A. 1

TABLE OF CONTENTS—Continued

Page

1. Proposed Stipulation Drafted By Petitioner/Defendant, March 1981 ..... A. 1
2. Letter, Sent By Respondent/Plaintiff Counsel Johnson And Webb To Petitioner/Defendant Counsel Wickham And Berenter, March 26, 1981 ..... A. 2
3. Letter, Sent By Petitioner/Defendant Counsel Wickham To Respondent/Plaintiff Counsel Johnson, April 3, 1981 ..... A. 6
4. Letter, Sent by Respondent/Plaintiff Counsel Johnson To Petitioner/Defendant Counsel Wickham, May 15, 1981 ..... A. 9
5. Letter, Sent By Petitioner/Defendant Counsel Wickham To Respondent/Plaintiff Counsel Johnson, June 16, 1981 ..... A. 12
6. Proposed Stipulation, Drafted By Respondent/Plaintiff, July 1981 ..... A. 13
7. Letter, Sent By Respondent/Plaintiff Counsel Johnson To Petitioner/Defendant Counsel Wickham, October 13, 1981 ..... A. 15
8. Proposed Stipulation, Drafted By Respondent/Plaintiff, November 1981 ..... A. 16
9. Letter, Sent By Respondent/Plaintiff Counsel Webb To Petitioner/Defendant Counsel Wickham, November 30, 1981 ..... A. 18

TABLE OF AUTHORITIES

Page

CASES:

Blum v. Stenson, 104 S. Ct. 1541 (1984) 40

Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980) 14

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 47

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) 21, 23, 40, 45

City of Philadelphia v. Chas. Pfizer & Co., 345 F.Supp. 454 (S.D.N.Y. 1972) 21

Clanton v. Allied Chemical Corp., 409 F.Supp. 282 (E.D.Va. 1976) 13

Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977) 40, 46

El Club del Barrio, Inc. v. United Community Corps., Inc., 735 F.2d 98 (3d Cir. 1984) 21, 29

Grunin v. Int'l House of Pancakes, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975) 14, 45

Haas v. Pittsburg Nat'l Bank, 77 F.R.D. 382 (W.D.Pa. 1977) 37

Hensley v. Eckerhart, 461 U.S. 424 (1983) 38, 39, 48, 49

In re Fine Paper Antitrust Litig., 751 F.2d 562 (3d Cir. 1984) 21

Jeff D. v. Evans, 743 F.2d 648 (9th Cir. 1984), *cert. granted*, 105 S.Ct. 2319 (1985) ..... *passim*

Jennings v. Metro. Gov't of Nashville, 715 F.2d 1111 (6th Cir. 1983) 14

Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 1929 (1984) 23

Krause v. Rhodes, 640 F.2d 214 (6th Cir.), *cert. denied sub nom. Sindell, Lowe & Guidubaldi v. Att'y Gen. of Ohio*, 454 U.S. 836 (1981) 23

TABLE OF AUTHORITIES—Continued

Page

Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985) 14, 22, 32, 34, 48, 49

Leisner v. N.Y. Telephone Co., 398 F.Supp. 1140 (S.D.N.Y. 1974) 13

McDonald v. Chicago Milwaukee Corp., 565 F.2d 416 (7th Cir. 1977) 23

Malchman v. Davis, Nos. 84-7589, 84-7669, slip op. (2d Cir. May 10, 1985) 23, 33, 38

Marek v. Chesney, 53 U.S.L.W. 4903 (U.S. June 27, 1985) 14, 15, 33

Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980), *cert. denied sub nom. Sanchez v. Tucson Unified School Dist.*, 450 U.S. 912 (1981) 20, 37

Moore v. Nat'l Ass'n of Securities Dealers, Inc., No. 83-2213, slip op. (D.C. Cir. June 4, 1985) ..... *passim*

Nat'l Treasury Employees Union v. IRS, 735 F.2d 1277 (11th Cir. 1984) 14, 23

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 47, 48

Obin v. Dist No. 9 of the Int'l Ass'n of Machinists and Aerospace Workers, 651 F.2d 574 (8th Cir. 1981) 22

Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco, 688 F.2d 615 (9th Cir. 1982), *cert. denied sub nom. Byrd v. Civil Service Comm'n of the City and County of San Francisco*, 459 U.S. 1217 (1983) 40

Parker v. Anderson, 667 F.2d 1204 (5th Cir.), *reh'g denied*, 671 F.2d 1378, *cert. denied*, 459 U.S. 828 (1982) 23

TABLE OF AUTHORITIES—Continued

	Page
Paul E. Iacono Structural Engineer, Inc. v. Humphrey, 722 F.2d 435 (9th Cir.), *cert. denied sub nom. Construction & General Laborers Union Local 304 v. Iacono Structural Engineer, Inc.*, 104 S.Ct. 162 (1983)	15
Pennhurst v. Halderman, 465 U.S. 89 (1984)	44
Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)	*passim*
Saylor v. Lindsley, 456 F.2d 896 (2d Cir. 1972)	36
Webb v. Dyer County Bd. of Educ., 53 U.S.L.W. 4473 (U.S. April 17, 1985)	39
White v. N.H. Dep't of Employment Sec., 629 F.2d 697 (1st Cir. 1980) *rev'd on other grounds*, 455 U.S. 445 (1982)	14, 22
White v. N.H. Dep't of Employment Sec., 455 U.S. 445 (1982)	17, 18, 32
Young v. Katz, 447 F.2d 431 (5th Cir. 1971)	45
Young v. Powell, 729 F.2d 563 (8th Cir. 1984)	14, 22
Youngberg v. Romero, 457 U.S. 307 (1982)	44

CONSTITUTIONAL PROVISIONS:

U. S. Const. amend. V	1
U. S. Const. amend. XIV, § 1	1
Idaho Const. art. I, § 1	3
Idaho Const. art. I, § 13	3
Idaho Const. art. I, § 18	3

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a-3(b) (1976) 13

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k) (1976) 12, 13

Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081 3

Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1461 3

Rehabilitation Act of 1973, 29 U.S.C. § 794 3

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982) ..... *passim*

COURT RULES:

Fed.R. of Civ.P. 16 ..... 36, 37, 38

Fed.R. of Civ.P. 16(a)(5) 37

Fed.R. of Civ.P. 16(c)(7) 37

Fed.R. of Civ.P. 23 ..... 36, 37, 38

Fed.R. of Civ.P. 23(e) ..... *passim*

Fed.R. of Civ.P. 59(e) 22

Fed.R. of Civ.P. 68 ..... 15, 33

U.S.Dist.Ct. for the Dist. of Idaho, Local Rule of Practice 2-109 2

ARTICLES, BOOKS AND CONGRESSIONAL COMMITTEE REPORTS:

Annual Report of the Director of the Administrative Office of the United States Courts (1984) 16

Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988,* 55 U.Colo.L.Rev. 341 (1984) 38

TABLE OF AUTHORITIES—Continued

Page

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MODEL CODES:

Model Code of Professional Responsibility, Canon 7 (1981) 32

Model Code of Professional Responsibility DR 1-102(A)(5) (1981) 16, 17, 31

TABLE OF AUTHORITIES—Continued

Page

BAR OPINIONS AND ETHICS COMMITTEE REPORT:

Final Subcomm. Report of the Comm. on Attorneys Fees, appointed by the Chief Judges of the United States District Court and the United States Court of Appeals for the District of Columbia Circuit, Bar Report 4 (Aug./Sept. 1984) 18, 25

Idaho State Bar, *The Rules for Review of Professional Conduct* (1983) 15

New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 80-94, *reprinted in* 36 The Record of the Ass'n of the Bar of the City of New York 507 (1981) 15

New York City Bar Ass'n Comm. on Professional and Judicial Ethics Op. No. 82-80 18

State Bar of Ga. Advisory Op. No. 39 (July 20, 1984) 18

REFERENCE TO OPINIONS BELOW

The Opinion of the Court of Appeals vacating the District Court's denial of attorney's fees and costs is reported at 743 F.2d 648 (9th Cir. 1984).

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JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 1651 (1982).

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CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

U. S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1988 (1982)

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

Rule 23(e), Federal Rules of Civil Procedure

> Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 2-109, Local Rules of Practice of the United States District Court for the District of Idaho

> The members of the bar of this Court shall adhere to the American Bar Association's Code of Professional Responsibility and the Code of Professional Ethics promulgated by the Supreme Court of the State of Idaho.

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STATEMENT OF THE CASE

Respondents, representing minor residents of various state-operated or -supported institutions in Idaho, brought this civil rights class action on August 4, 1980, in Federal District Court for the District of Idaho, seeking declaratory and injunctive relief on behalf of emotionally or mentally handicapped Idaho children committed to such institutions. (J.A. 4-5). The complaint specified nine causes of action, including denial of due process and equal

protection under the Fifth and Fourteenth Amendments to the United States Constitution and article I, §§ 1, 13, and 18 of the Idaho Constitution; discrimination against handicapped persons in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1461, and the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081; and failure to comply with various provisions of the Idaho Constitution and Idaho Code dealing with the treatment, custody, and education of institutionalized juveniles. (J.A. 17-30). Specifically, respondents sought an injunction prohibiting the admission of members of the plaintiff class to State Hospital South, a psychiatric hospital in Blackfoot, Idaho, administered by petitioners Bowman, Bachik and Gruzinski in performance of their duties as officers in the Idaho Department of Health and Welfare; establishment of community-based residential facilities to provide additional mental health services; and costs and attorney's fees pursuant to 42 U.S.C. § 1988. (J.A. 30-31). John V. Evans was named as a defendant in his official capacity as Governor of the State of Idaho.

Settlement negotiations began on January 8, 1981, when Charles Johnson, III, attorney and next friend for plaintiffs/respondents (J.A. 32), sent a proposed consent decree to James Wickham, Deputy Attorney General for the State of Idaho. This proposal was silent as to attorney's fees and costs. In a return proposal, dated March 1981, defendants/petitioners offered to grant part of the relief requested but specified in paragraph 13 that "[e]ach party shall bear all costs and attorneys fees incurred in this action." (A. 1).

Respondent Johnson and his co-counsel, Russell E. Webb, replied to this counter-proposal on March 26, 1981, in a letter that indicated basic approval of the education portion of petitioners' March 1981 proposal, but made a number of specific objections to the mental health portion. The letter kept open the attorney's fees negotiations by stating that "[i]n light of these problems, there can be no stipulation on your paragraph 13 [waiver of attorney's fees] *at this time.*" (A. 5) (emphasis added).

Mr. Wickham demonstrated flexibility on the attorney's fees issue in his April 3, 1981, reply: "[i]f you desire to preserve your right to seek fees and costs in the unlikely event enforcement proceedings are required, the state is willing to modify its position to the effect that all parties bear their own costs and fees *thus far incurred.*" (A. 8-9) (emphasis added).

Intense negotiations over the next two months included active bargaining over both the merits and the attorney's fees and resulted in concessions on both sides. (*See* letters of May 15, 1981, and June 16, 1981, A. 9, 12). Respondents' proposal of July 14, 1981, contained a revised paragraph 13(e) providing that all parties "shall bear their own attorney's fees and costs thus far incurred." (A. 15). The stipulation in settlement of the education related claims, accepted by the district court in an order dated October 19, 1981, incorporated respondents' own wording explicitly waiving attorney's fees in paragraph 12(e). (J.A. 54).

Respondents' proposal to settle the remaining mental health claims, tendered on November 10, 1981, again put forward identical fee waiver language in paragraph 10(e).

(A. 18). However, negotiations reached an impasse in December 1981. Both sides then moved for summary judgment. (R. Dist. Ct. Doc. Nos. 57 and 62). On July 26, 1982, the district court granted partial summary judgment in favor of petitioners as to all claims except those arising under the federal constitution and a single state law provision. (J.A. 56-57).

Following the district court's summary judgment order, settlement proposals by petitioners continued to include attorney's fee waiver provisions, whereas proposals by respondents were silent as to attorney's fees. In March 1983, counsel for respondents asserted that it was unethical for petitioners to condition settlement on waiver of costs and attorney's fees. However, the parties agreed to submit the ethics question to the district court, negotiated a settlement with a provision that both respondents and petitioners waived "costs and attorney's fees thus far incurred, *if so approved by the Court*" (J.A. 104) (emphasis added), and further stipulated that the settlement was to be tendered to the district court for approval only if it concluded the practice was ethical.

On March 22, 1983, pursuant to Fed. R. of Civ. P. 23(e), the district court took the proposed stipulation under advisement and vacated trial.[1] (R. Dist. Ct. Doc. No. 116). However, even before the district court ruled on the ethics question and the settlement agreement containing the stipulated fee waiver provision, respondents filed a

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[1]Due to the death of the court reporter present at the March 22, 1983, hearing and the extremely poor quality of the tape recording of that hearing, no transcript of the hearing is available.

motion seeking costs and attorney's fees on April 4, 1983. (J.A. 87). The district court on April 28, 1983, upheld the ethics of the waiver and thus approved the entire stipulation settling the mental health claims. (J.A. 93-94). The court then denied respondents' separate motion for costs and attorney's fees in an order dated May 9, 1983. (J.A. 106-107). Respondents' appeal to the Ninth Circuit Court of Appeals on May 25, 1983, challenged only this order denying attorney's fees and costs. (J.A. 108).

Recognizing that petitioners had agreed to settle the merits of the case only on condition that attorney's fees be waived—and that petitioners retained the option "to withdraw the stipulation and put us to trial" if the fee waiver was not approved (J.A. 93)—the district court granted petitioners' June 3, 1983, motion (J. A. 109) to suspend performance of the entire stipulation pending appeal in an order dated August 12, 1983. (J.A. 111). This recognition of the nonseverability of the merits and attorney's fees was also the basis of the district court's denial on September 6, 1983 (J. A. 114) of respondents' August 29, 1983, motion (J. A. 113) to stay the August 12 order. *See* letter from district court Judge Marion J. Callister to attorney Johnson. (J.A. 115).

Despite the district court's clear understanding of the intent of the parties, the Ninth Circuit has consistently taken the view that the merits and attorney's fees portions of the stipulation are severable. On September 26, 1983, the Ninth Circuit vacated the district court's stay order of August 12, 1983 (J. A. 117), thus requiring petitioners to comply with the mental health stipulation even though the attorney's fees issue was on appeal. Similarly, the Ninth Circuit's decision, which "reversed and re-

manded for determination of reasonable attorneys fees," while upholding the remainder of the stipulation, *Jeff D. v. Evans,* 743 F.2d 648, 652 (9th Cir. 1984), reflected this view.

Subsequent rulings by the Ninth Circuit have forced petitioners to comply with the merits portion of their stipulation upon the settlement while depriving them of the benefit of their bargain on attorney's fees. The Ninth Circuit on November 6, 1984 (J. A. 119), vacated the district court's October 22, 1984, order (J. A. 118) which had granted petitioners' motion (R. Dist. Ct. Doc. No. 138) to toll their obligation to reply to respondents' attempts to discover the degree of petitioners' compliance with the mental health portion of the stipulation. On December 6, 1984, the Ninth Circuit denied *in toto* petitioners' November 28, 1984, motion for stay of mandate. (R. 9th Cir.). A subsequent motion by petitioners to recall the mandate was granted on January 14, 1985, but with the proviso that petitioners were required to comply with the mental health stipulation. (R. 9th Cir.).

SUMMARY OF ARGUMENT

The simultaneous negotiation of both merits and attorney's fees in class action settlements is not inherently unethical. The plain language of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982) [hereinafter cited as Act], contains no proscription against simultaneous negotiations. The weight of judicial interpretation of the Act permit simultaneously negotiated

settlements, as do most bar opinions that have addressed the issue, though not binding on the courts.

Nor does the Act proscribe a defendant's offer of settlement, conditioned on reduction or waiver of plaintiff's attorney's fees. Plaintiff has a right to waive attorney's fees and defendant has a right to condition offers of settlement on such waivers during the negotiating process. Whether the attorney's fee issue is first raised by counsel for plaintiff or for defendant is immaterial.

A *per se* rule requiring a bifurcation of settlement negotiations as to the merits and attorney's fees will result in several unintended consequences. Most significantly, mandatory bifurcation discourages negotiated settlements, in conflict with congressional and judicial policies favoring such settlements. In addition, a mandatory process of bifurcated negotiations would be difficult, if not impossible, to enforce because it runs counter to the fundamental need of both plaintiff and defendant to settle all issues before them rather than risk the uncertainty of trial. Under a bifurcated scheme, any subsequent reduction in plaintiff's attorney's fees accrues to the benefit of the defendant, not to the plaintiff class. Bifurcation also strains judicial resources by requiring additional proceedings. Finally, the imposition of a bifurcated settlement process reflects a profund distrust of attorneys and their ability to conduct themselves ethically and in the ability of district courts to ferret out any unethical conduct that might taint a negotiated settlement.

Whatever unethical conduct that might arise in class action settlements may be exposed and expunged by the district court exercise of its Fed. R. of Civ. P. 23(e) set-

tlement review powers. Rule 23(e), while primarily intended to protect unnamed class members, may be extended to review the propriety of the attorney's fee portion of the settlement agreement on a case by case basis. In conducting this review, the district court should begin with the assumption that the parties have conducted themselves ethically during negotiations.

A defendant who agrees to settle a case only upon resolution of the attorney's fee issue should not be stuck with the merits portion of the settlement if the fees portion is rejected either by the district court or on appeal. If the district court has approved the settlement package, its approval should not be overturned on appeal absent a finding of an abuse of discretion. Any ruling that unilaterally extends defendant's liability beyond the negotiated settlement package must be rejected as violative of the settlement process. Plaintiff's attorney must not be allowed to negotiate a settlement that includes a waiver of attorney's fees as a bargaining chip to achieve more generous relief for their clients, and then seek to recoup their attorney's fees upon review.

In the present case, the plaintiffs saw their federal class action dissolve as the district court rejected the bulk of their claims by partial summary judgment. Left only with highly speculative federal constitutional claims, plaintiffs negotiated a settlement that was asknowledged by the Ninth Circuit itself as securing more for the class than the district court would have been willing to grant at trial. Under these circumstances, the district court, with a three-year exposure to the litigation, approved the negotiated settlement, including a fee waiver.

In so doing, the district court directly addressed the fee waiver issue and found no unethical conduct. The Ninth Circuit rejected the district court's approval of the settlement agreement without finding any abuse of discretion by the district court and then remanded the attorney's fee issue while upholding the merits portion of the settlement package. These rulings, together with the Ninth Circuit's imposition of a *per se* bifurcated settlement rule on all subsequent negotiated settlements in the circuit, must be reversed.

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ARGUMENT

I.

The Court Of Appeals Erred In Holding It Unethical For Parties In Civil Rights Class Actions To Negotiate A Settlement On The Merits Simultaneously With A Settlement Of Attorney's Fees And Costs.

A. Simultaneous Negotiation Of The Merits And Of Attorney's Fees Is Not Inherently Unethical.

Jeff D. ruled that due to the potential conflict of interest between the plaintiff class and its attorney in a civil rights class action, all negotiated settlements, absent unusual circumstances, must be conducted in two separate stages. 743 at 652. The Court in *Jeff D.* followed the rule established by the Third Circuit in *Prandini v. Nat'l Tea Co.*, 557 F.2d 1015 (1977), holding that parties are forbidden to negotiate attorney's fees until after court approval of a settlement on the merits.

The bifurcated settlement process mandated by the *Jeff D.* and *Prandini* courts is directed at eliminating two distinct potential conflict of interest problems. The first problem, which was the primary concern of the *Prandini* court, is that of a "sweetheart deal." This arises when plaintiff's attorney is "tempted with a generous fee offer as a *quid pro quo* for a less than optimal settlement" for the plaintiff class. *Jeff D.*, 743 F.2d at 652; *Prandini*, 557 F.2d at 1021.

The second potential conflict of interest problem was addressed by the Ninth Circuit in *Jeff D.* Termed the "sacrifice" problem, *Moore v. Nat'l Ass'n of Sec. Dealers*, No. 83-2213, slip op. at 5-6 n. 4 (D.C. Cir. June 4, 1985) (Wald, J., concurring), the conflict of interest arises when defendant conditions a settlement offer, favorable to the plaintiff class, on a waiver or reduction of plaintiff's counsel's fees.[2] The plaintiff's lawyer may feel ethically bound to accept such an offer, despite the waiver or reduction in fees. Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U.Pa.L.Rev. 793, 794 (1983) [hereinafter cited as Comment, *Settlement Offers*].

The question before this court is whether—in light of these alleged conflict of interest problems—a ban on simultaneous negotiations is required by or will best carry out the policies embodied in the Act and the civil liberties the Act is designed to protect.

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[2]The two situations have been more bluntly called "a *bribe* or an *extortion* threat." Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 Law and Contempt. Probs. 293, 294 (1983).

1. *The Attorney's Fees Awards Act Does Not Preclude Simultaneous Negotiations.*

The Ninth Circuit in *Jeff D.* banned the simultaneous negotiation of merits and attorney's fees in civil rights class action suits. Under this ban, the plaintiff is prevented from waiving attorney's fees as a bargaining chip during negotiations, and the defendant is prevented from making a full settlement offer disposing of both the merits and the attorney's fees. Neither result is addressed, let alone proscribed, by the Act, which states:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1982).

Thus, the plain language of the statute contains no ban on the common practice of simultaneous negotiations of the merits and attorney's fees, or the voluntary waiver of attorney's fees by plaintiff attorneys, or the offer by defendant attorneys of settlements that dispose of all issues in dispute, including those dealing with attorney's fees.

> Nowhere in the express language of the statute [42 U.S.C. § 2000e-5(k)] is there provision addressing the waiver of fees during settlement negotiations. Nor is there any such discussion in the language of the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. 1988, which contains an attorneys' fees provision analogous to that contained in section 706(k) .... The legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976, *supra*, which contains an extensive overview of congressional policy on attorneys'

> fees awards in civil rights cases, including Title VII claims, similarly fails to refer to any limitation on the negotiability of fees.

Moore, slip op. at 14-15. Indeed, the statutory interpretation and legislative history—as authoritatively construed by this Court and the federal courts of appeal—supports the simultaneous negotiation and voluntary waiver of attorney's fees.

A primary purpose of the Act was to "achieve uniformity in the remedies provided by federal laws guaranteeing civil and constitutional rights." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1, [hereinafter cited as House Report]. To achieve this goal, an earlier version of the Act providing for mandatory awards of attorney's fees was rejected and substitute language ("the court, in its discretion") was adopted. *Id.* at 3. The Act was expressly patterned after Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k) (1976). House Report, *supra* at 5. Further, Congress expressly intended to authorize courts to look to developing case law on other fee provisions to implement the Act. *Id.* at 8.

Significantly, before passage of the Act, federal courts had interpreted Titles II and VII to allow plaintiffs to waive attorney's fees. *Clanton v. Allied Chemical Corp.,* 409 F.Supp. 282 (E.D. Va. 1976); *Leisner v. N.Y. Telephone Co.,* 398 F.Supp. 1140 (S.D.N.Y. 1974). Congress must be presumed to have known of this judicial gloss on the parallel statutes upon which it patterned the Act.

Since 1976, federal courts have repeatedly authorized waivers and implied waivers from the various statutes the

Act was intended to "make uniform." *Moore*, No. 83-2213, slip op. (D.C.Cir. June 4, 1985); *Lazar v. Pierce*, 757 F.2d 435 (1st Cir. 1985); *Nat'l Treasury Employees Union v. IRS*, 735 F.2d 1277 (11th Cir. 1984); *Young v. Powell*, 729 F.2d 563 (8th Cir. 1984); *Jennings v. Metro. Gov't of Nashville*, 715 F.2d 1111 (6th Cir. 1983); *White v. N. H. Dept of Employment Sec.*, 629 F.2d 697 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982); *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127 (10th Cir. 1980); and *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

In short, Congress intended by passage of the Act to achieve uniformity of remedies in federal civil rights practice and expressly recognized the discretion of federal courts to award or deny attorney's fees. Those same courts have repeatedly construed both the Act and parallel statutes to allow negotiation, settlement and waiver of attorney's fees.[3]

In like manner, this Court has recently emphasized the theme of achieving uniformity regarding remedies in federal civil suits, and extended that theme to the area of settlements as well. "There is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned." *Marek v. Chesny*, 53 U.S.L.W. 4903, 4906 (U.S. June 27,

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[3]To suggest that a plaintiff cannot waive attorney's fees would be an anomaly in American law: "If constitutional rights can consciously be waived by a defendant in a criminal case, it would be an excess in paternalism to conclude that parties to a civil dispute cannot do likewise." *Lazar*, 757 F.2d at 439 (Torruella, J., concurring).

1985). Applying this principle in the Fed. R. of Civ. P. 68 context, this Court construed the language and legislative history of the Act to allow defense attorneys "to make lump sum offers that would, if accepted, represent their total liability. . . ." *Marek*, 53 U.S.L.W. at 4905.

Thus, in the context of formal offers of judgment under Rule 68, defendant attorneys are free to make offers that fully dispose of both the merits of the case and the attorney's fees. If follows *a fortiori* that such offers are not unethical during the give and take of informal settlement negotiations.

2. *Bar Opinions and Ethics Committee Reports Differ Over the Ethics of Simultaneous Negotiations.*[4]

The Ninth Circuit in *Jeff D.* relied upon the New York City Bar Ass'n Comm. on Professional and Judicial Ethics Formal Op. 80-94, *reprinted in* 36 The Record of the Ass'n of the Bar of the City of New York 507 (1981) [hereinafter cited as New York Opinion I], which held it "unethical for

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[4]"Until the Model Code is adopted as law by the courts, the legislature, or the regulatory authority charged with the discipline of lawyers in a particular jurisdiction, the canons and disciplinary rules of the Model Code are merely horatory, not proscriptive." *Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 438 (9th Cir.), *cert. denied sub nom. Construction and General Laborers Union Local 304 v. Iacono Structural Engineer, Inc.*, 104 S.Ct. 162 (1983). The United States District Court for the District of Idaho has mandated that members of the court's bar "shall adhere to the American Bar Association's Code of Professional Responsibility and the Code of Professional Ethics promulgated by the Supreme Court of the State of Idaho." Local Rule of Practice 2-109. *The Rules for Review of Professional Conduct*, adopted by the Idaho Supreme Court on June 3, 1983, do not proscribe simultaneous negotiations.

defense counsel to attempt to negotiate the fee award [under statutes designed to encourage the enforcement of civil rights and civil liberties] simultaneously with the negotiation of the settlement of the merits." *Id.* at 511. The Committee found that settlement offers conditioned on a waiver of attorney's fees are unethical, in violation of the Model Code of Professional Responsibility [hereinafter cited as Model Code], DR 1-102(A)(5) (1981), which provides, "A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice."

By relying upon the extremely general prescriptions of Model Code DR 1-102(A)(5), the New York City Bar's Ethics Committee exposed the foundational weakness of its opinion.[5] The Committee was unable to find any specific A.B.A. ethical consideration or disciplinary rule that prohibits simultaneous negotiations or conditional offers. *See* Comment, *Settlement Offers*, *supra* p. 11, at 809. Moreover, one would need a direct pipeline to the brooding

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[5]Surely, no empirical evidence exists to support the Committee's fear that simultaneous negotiations "undermine efforts to make counsel available" in civil rights litigation. The increase in employment civil rights cases in the Third Circuit since the 1977 *Prandini* decision banning simultaneous negotiations has been 136%. *Annual Report of the Director of the Admin. Office of the United States Courts* 146 (1984). By comparison, the Tenth Circuit, which permits simultaneous negotiations, *Stover*, 624 F.2d 127, has experienced a 139% increase in such cases over the same period. *Id.* at 147. The lack of discernible difference between these two circuits with divergent rules suggests that simultaneous negotiations have minimal impact on the willingness of counsel to bring civil rights cases. More generally, in the decade since enactment of § 1988, traditional civil rights cases (voting rights, accommodations, welfare) have actually declined, whereas general civil rights and employment discrimination cases have grown at a phenomenal compound annual growth rate of 7.1%. *Id.* Current practice apparently does not undermine efforts to find available counsel.

omnipresence of the Natural Law to deduce that conditional offers or simultaneous negotiations are "prejudicial to the administration of justice."

Indeed, as we shall argue *infra* p. 31, the abstract concerns of Model Code DR 1-102(A)(5) can just as readily be used to support conditional offers as to ban them: The failure of a defense attorney to actively and vigorously represent his or her client—by failing to determine the client's total liability from relief on the merits and from fees—would also be conduct "prejudicial to the administration of justice." *See* Comment, *Settlement Offers*, *supra* p. 11, at 811.

The New York Opinion I was not without the dissent of a "substantial minority." *Supra* p. 15, at 510. The minority reasoned:

> [S]ome defendants, particularly in an action seeking injunctive relief only, might be willing to settle the merits provided they could eliminate or at least limit their monetary exposure on an award of counsel fees, but that they would be unwilling to settle the merits if they faced uncertain monetary exposure for counsel fees.

Id. at 511.

This Court in *White v. N. H. Dep't of Employment Sec.*, 455 U.S. 445 (1982), echoed and endorsed these sentiments of the minority, stating:

> In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.

Id. at 453 n. 15. Thus, while not ruling on the ethics of simultaneous negotiations, this Court acknowledged the basic need a defendant has "to know his total liability from both damages and fees" if there is ever to be a negotiated settlement. *Id.*

In response, the Committee majority issued a "clarification" of its position in a subsequent opinion in which it permitted defense counsel to request plaintiff's counsel to supply information concerning hours spent, customary rates, and any multiplier anticipated, so long as the request or information did not constitute fee bargaining. The New York Bar Association Committee on Professional and Judicial Ethics Opinion No. 82-80 [hereinafter cited as New York Opinion II]. The majority thus made the minimal adjustment required by *White*.

The dissenting minority continued to be concerned with the prohibition against simultaneous negotiation "as continuing to interfere with the right of the defendant to know his exposure, and to insist, if he wishes, on a lump sum settlement inclusive of attorneys' fees." *Id. Accord* State Bar of Georgia Advisory Op. No. 39 (July 20, 1984). A parallel criticism was leveled by the D. C. Circuit in *Moore*, which stated that "[t]his approach is no more satisfactory, however, because it would permit through the back door what was made impermissible through the front. At best, it gives a defendant only a limited indication of his ultimate liability." Slip op. at 24 n. 16.

More realistic is the Final Subcomm. Report of the Comm. on Attorneys Fees, appointed by the Chief Judges of the United States District Court and United States Court of Appeals for the District of Columbia Circuit, Bar

Report 4 (Aug./Sept. 1984) [hereinafter cited as D.C. Circuit Report]. In the "sweetheart" context, the D. C. Circuit Report opined that adequate protection is provided by an informed plaintiff or, in the class action context, by full disclosure to the judge of the terms of all aspects of the settlement and review under Fed. R. of Civ. P. 23(e). *Id.* at 5-6.

In the "sacrifice" context involving conditional settlement offers, the D. C. Circuit Report concluded that the ethics of the situation depends on the circumstances. *Id.* In some situations, particularly where the plaintiff's case is weak, a conditional settlement offer may be entirely proper. Of course, the plaintiff and his or her counsel are free to reject it if they feel the case is of sufficient strength. *Id.* The Report noted:

> The key in these situations is whether the defendants' offer is reasonable in light of all the circumstances, including the chances of success on the merits and the risk of possible exposure in damages and attorneys fees. And in making such determinations, the legitimate interest of the fee shifting provisions must be balanced against the legitimate interest of the defendant, whether a governmental agency or private party, in making an offer which will fix liability with considerable certainty.

Id.; see infra p. 24.

Clearly there are divergent views reflected in the opinions of the various ethics committees that have addressed the potential conflict of interest problems associated with simultaneous negotiation of both merits and attorney's fees and conditional settlement offers. The diversity of views reveals the complexity of the issues in-

volved. Precisely because of this complexity, a *per se* bifurcated settlement rule is not appropriate.

3. *Most Federal Circuits Have Rejected The Bifurcated Settlement Procedure.*

The Ninth Circuit's decision in *Jeff D.* to ban simultaneous negotiations and to impose a strict bifurcated settlement process relied primarily on the Third Circuit opinion in *Prandini* and on the Ninth Circuit's own earlier ruling in *Mendoza v. United States,* 623 F.2d 1338 (1980), *cert. denied sub nom. Sanchez v. Tucson Unified School Dist.,* 450 U.S. 912 (1981). None of the other circuit courts has been sympathetic to the Ninth Circuit approach and, in fact, a close reading of *Prandini* and *Mendoza* shows that neither of those cases justifies a *per se* rule banning simultaneous negotiations.

In *Mendoza,* an objector appealed a negotiated settlement in a school desegregation class action, providing for injunctive relief and $500,000 in attorney's fees. 623 F.2d at 1342. While agreeing with the objector that simultaneous negotiations were disfavored, the Ninth Circuit nonetheless affirmed the district court's approval of the settlement, finding no improprieties therein. *Id.* at 1353 n. 20. Thus, the *Mendoza* decision actually stands for the proposition that simultaneous negotiations need not be unethical and that a conscientious court is able, on a case by case basis, to ferret out unethical conduct without resort to a bifurcated structure.

In *Prandini,* the defendants settled the merits for approximately 90% of their potential liability, and offered to settle attorney's fees at approximately 80% of the hours

expended times the requested rates.[6] 557 F.2d at 1018. The major issue on appeal was not simultaneous negotiations but the allocation of attorney's fees among the several counsel representing the prevailing plaintiffs. *Id.* The Third Circuit addressed the simultaneous negotiation issue only because of "the duty to see to it that the administration of justice has the appearance of propriety as well as being so in fact." *Id.* at 1021. Yet, the *Prandini* court could find no ethics opinion or ruling disapproving simultaneous negotiation of the merits and attorney's fees and costs. *Id.* Further, two of the three cases cited by the court were resolved without resorting to a bifurcated settlement process. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ($10 million damages of the settlement affirmed while the $1.5 million to plaintiff's counsel was reduced); *City of Philadelphia v. Chas. Pfizer & Co.*, 345 F.Supp. 454 (S.D.N.Y. 1972) (the court upheld simultaneously negotiated attorney's fee award).

Subsequent Third Circuit panels have shown no inclination to read *Prandini* expansively or to follow it strictly. The *Prandini* doctrine apparently has no vitality in the context of antitrust/derivative action suits. *See In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 (3d Cir. 1984). Even in the civil rights area, the Third Circuit appears to be wavering on bifurcation. In *El Club del Barrio, Inc. v. United Community Corps., Inc.*, 735 F.2d 98 (3d Cir. 1984), the court upheld the plaintiff's

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[6]For a complete discussion of *Prandini*, and of the odd outcome of the Third Circuit's modification of the district court's order in that case, see Note, *Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys Fees in a Title VII Class Action*, 51 Temp. L.Q. 799 (1978) [hereinafter cited as Note, *Conflicts*].

right to seek subsequent attorney's fees, but indicated that had a stipulation as to a waiver of attorney's fees been placed in the settlement agreement, such a waiver would have been upheld—a view that cannot be reconciled with *Prandini's* ban on simultaneous negotiations. *Id.* at 101. Finally, the court noted that "*Prandini* may be, as suggested by defendant's counsel, 'more honored in the breach'. But the vitality and scope at *Prandini* are not before this court today." *Id.* at n. 3.

The Eighth Circuit likewise appears to be retreating from an earlier decision favoring bifurcation. In *Obin v. Dist. No. 9 of the Int'l Ass'n of Machinists and Aerospace Workers,* 651 F.2d 574 (1981), the court stated in dicta that application of Fed. R. of Civ. P. 59(e) to an attorney's fee would raise serious ethical problems by requiring counsel to discuss the substantive issues simultaneously with the amount of the attorney's fee award during settlement negotiations. *Id.* at 582. By contrast, in *Young,* 729 F.2d 563 (1984), the Eighth Circuit recently held that when a settlement stipulation purports to resolve *all* issues disputed in the complaint, "the parties should not stipulate to a dismissal without reserving the unresolved issues or in some appropriate way indicating their intent as to such issues." *Id.* at 566, 567 n. 3. When the complaint requests attorney's fees, it would be impossible for future litigants to comply with the ruling in *Young* without injecting the issue of attorney's fees into the settlement negotiations.

Federal courts in seven of the federal circuits have upheld simultaneously negotiated settlements. These include the First Circuit, *Lazar,* 757 F.2d 435 (1985); *White,*

629 F.2d 697 (1980); the Second Circuit, *Malchman v. Davis*, Nos. 84-7589, 84-7669, slip op. at 13 (May 10, 1985); *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881 (1983) *cert. denied*, 104 S.Ct. 1929 (1984); *City of Detroit*, 495 F.2d 448; the Fifth Circuit, *Parker v. Anderson*, 667 F.2d 1204, *reh'g denied*, 671 F.2d 1378, *cert. denied*, 459 U.S. 828 (1982); the Sixth Circuit, *Krause v. Rhodes*, 640 F.2d 214, *cert. denied sub nom. Sindell, Lowe & Guidubaldi v. Att'y Gen. of Ohio*, 454 U.S. 836 (1981); the Tenth Circuit, *Stover*, 624 F.2d 127 (1980); the Eleventh Circuit, *Nat'l Treasury Employees Union*, 735 F.2d 1277 (1984); and the Court of Appeals for the District of Columbia, *Moore*, No. 83-2213, slip op. at 26 (June 4, 1985).

The only reported Seventh Circuit decision to discuss simultaneous negotiations avoided *Prandini* while upholding the simultaneously negotiated settlement. *McDonald v. Chicago Milwaukee Corp*, 565 F.2d 416 (1977).

It is clear that the prevailing mood among the federal circuit courts is that simultaneous negotiations are ethically permissible in civil rights class actions and that existing mechanisms are sufficient to ferret out any unethical conduct without resort to the rigid bifurcation procedure imposed by the *Jeff D.* and *Prandini* courts.

B. Bifurcation of Negotiated Settlements Will Result In Unintended Consequences.

The Ninth Circuit's ban on simultaneous negotiations and its *per se* requirement of a bifurcated settlement structure are intended to eliminate any possible conflict of interest arising between the plaintiff class and plaintiff's counsel. *Jeff D.*, 743 F.2d at 652. However, a change

in structure will also have unintended consequences,[7] including: (1) discouragement of negotiated settlements, and (2) enforcement problems due to pressures placed on both the plaintiff and defense attorneys to evade the imposed bifurcated process. Additionally, bifurcation increases the burdens placed on the courts and prevents any subsequent court reduction in plaintiff's attorney's fees from accruing to the benefit of the plaintiff. Finally, and perhaps most unfortunately, manditory bifurcation "displays an implicit lack of trust in the practicing bar's ability to engage ethically in settlement negotiations." *Moore*, slip op. at 23 n. 15.

1. *A Ban On Simultaneous Negotiations Will Discourage Negotiated Settlements.*

The public policy favoring negotiated settlement of civil rights class actions is severely undermined by the *Prandini* and *Jeff D.* courts' ban on simultaneous negotiation of merits and attorney's fees. Courts, bar committees, and commentators all identify the same reason why a ban on simultaneous negotiations impairs negotiated settlements:

> The subcommittee also recognized that the *Prandini* approach made it more difficult for defendants to

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[7]Sociologist Robert K. Merton observed that practices or structures perform both manifest and latent functions. R. Merton, *Manifest and Latent Functions* in *On Theoretical Sociology: Five Essays, Old and New*, 73 (1967). The manifest functions are "those objective consequences for a specified unit (person, subgroup, social or cultural system) which contribute to its adjustment or adaptation and were so intended." *Id.* at 117. "Latent functions," according to Merton, refer to unintended and unrecognized consequences. *Id.* Merton warned that to ignore the latent consequences of social change would considerably heighten the risk of failure. *Id.* at 135.

> settle cases because they cannot fix their total exposure, unless information about attorneys fees is supplied through the back door.

D. C. Circuit Report, *supra* p. 19, at 6. The D. C. Circuit Court of Appeals recently reached the same conclusion, namely, that adoption of the *Prandini/Jeff D.* rule would deprive plaintiffs of the

> right to waive their statutory fees and costs and force them to negotiate first and exclusively on the merits of the case. Defendants in such cases would be more reluctant to settle at this early stage because of uncertainty about their ultimate liability for attorneys' fees and costs. As a result, many more cases would fail settlement and proceed to trial. Thus, a requirement in every case that merits be discussed and settled first would prove ultimately a disservice to plaintiffs as well as defendants.

Moore, slip op. at 23-24. This same point—that a ban on simultaneous negotiations will hurt plaintiffs as often as defendants—was made even more strongly by Judge Wald in her concurring opinion in *Moore:*

> the *Jeff D.* approach probably means that a defendant who is willing to grant immediate prospective relief to a plaintiff class, but would rather gamble on the outcome at trial than pay attorneys' fees and costs up front, will never settle. In short, removing attorneys' fees as a "bargaining chip" cuts both ways. It prevents defendants, who in Title VII cases are likely to have greater economic power than plaintiffs, from exploiting that power in a particularly objectionable way; but it also deprives plaintiffs of the use of that chip, even when without it settlement may be impossible and the prospect of winning at trial may be very doubtful.

Moore, slip op. at 4 (Wald, J., concurring).

Even the plaintiffs' bar candidly recognizes that a ban on simultaneous negotiations discourages negotiated settlements. As one seasoned plaintiff litigator put it:

> A defendant with good prospects for escaping any significant adverse judgment may be willing to settle only if he knows that his total liability, including fees, will be less than the costs of defending the case. If the potential attorney's award is substantial and uncertain, the defendant may prefer to go to trial.

Interview with Charles Stephen Ralston, NAACP Legal Defense Fund, in New York City, June 25, 1981, reported in Rhode, *Class Conflicts in Class Actions*, 34 Stan.L.Rev. 1183, 1207 n. 15 (1980). *See also* Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees Are Authorized*, 14 Clearinghouse Rev. 515, 517 (October 1980).

In short, it is hard to argue that the discouragement of negotiated settlements is merely an "unintended consequence" of a ban on simultaneous negotiations. On the contrary, it is universally recognized that discouraging such settlements is the direct and inevitable consequence of such a ban.

It is not always appreciated how profoundly a ban on simultaneous negotiations works to undermine the policies embodied in the Act and the civil liberties that Act is designed to protect. The issue is trivialized if it is seen merely as one of choosing between defense counsel's right to know a "bottom line" and plaintiff counsel's need to take a "hard look" at a "hole card." Such "hard bargaining" language does not do justice to the full spectrum of real world negotiations.

Trained negotiators and mediators point out that "[b]ehind opposed positions lie shared and compatible interests, as well as conflicting ones." Fisher & Ury, *Getting to Yes* 43 (1984). This is particularly so in civil rights class action cases where suit is often brought by clients of a public interest law firm against the governmental entity entrusted by law to serve those same clients. In such cases, the governmental defendant may be acutely aware that a given institution suffers from crowded conditions, is understaffed, or needs educational upgrading. One need not be a Pollyanna to see "shared and compatible interests" between plaintiffs and defendants in such suits.

The first step in "principled negotiations" is to identify shared interests. This cannot happen if one is forbidden to discuss them.

> The purpose of negotiating is to serve your interests. The chance of that happening increases when you communicate them. The other side may not know what your interests are, and you may not know theirs. One or both of you may be focusing on past grievances instead of on future concerns. Or you may not even be listening to each other. . . . If you want the other side to take your interests into account, explain to them what those interests are.

Id. at 51. Once the parties' interests are communicated and understood, the key step is to "invent options for mutual and compatible interest" of both the public interest plaintiff and the public servant defendant. Only in this way can the parties maximize benefits from limited resources—which is the genuinely "shared and compatible interest" of both the public interest plaintiff and the public servant defendant.

A *per se* rule that bans simultaneous negotiations and imposes a mandatory two-step bargaining process takes away from both plaintiffs *and* defendants a share of their bargaining chips as they sit at the negotiating table. The policies of the Act are frustrated by the "unintended" but inevitable consequences that result.

First, the parties, both plaintiffs and defendants, lose their ability to invent options for mutual gain if they cannot discuss the total resource package available to the governmental defendant. It is impossible to enlarge the menu of options if presented with a "fixed pie" or a "fixed sum" game. Such situations allow only a "win/lose" outcome, not a "win/win" outcome because they function "as essentially either/or—either I get what is in dispute or you do." *Id.* at 61.

Second, the bottom line benefit to plaintiff is likely to be less. A prudent defense counsel will come in low in a settlement offer on the merits during phase one of bifurcated negotiations in order "to retain an economic 'cushion' to provide for impending attorneys' fees in the second proceeding." Rhode, *supra* p. 26, at 800 n. 12. As in *Prandini* itself, any subsequent court reduction in plaintiff's attorney's fees results in a savings to the defendant, not a benefit to the plaintiff. *Id.* at 812.

Third, when the win/win mechanism of principled negotiations gives way to the win/lose framework of the courtroom, one sows the seeds of future problems. A wise plaintiff knows that ultimate success "depends to a degree on making the other side sufficiently content with an agreement to want to live up to it." Fisher & Ury, *supra* p. 27, at 75. The defendant who simply "loses" and has no say in how limited resources will be put to use, is less likely to be a cooperative problem-solver.

2. ***Bifurcation Creates Pressure On Attorneys For Both Plaintiff And Defendant To Evade The Imposed Process, Leading to Enforcement Problems.***

If the *Jeff D.* ban on simultaneous negotiations seeks to be a "deliberate enactment of social change" rather than a mere indulgence in "social ritual," Merton, *supra* note 7, at 135, then it is important to know whether such a ban will work. The evidence available to date strongly suggests that it will not.

In *El Club del Barrio,* the Third Circuit Court itself noted that "*Prandini* may be, as suggested by defendants' counsel, 'more honored in the breach.' " 735 F.2d at 101 n. 3. The reason for this is clear: Settlement of disputes is in the interest of both plaintiff and defendant. To the degree that a bifurcated process inhibits the parties from negotiating all outstanding issues, they will be motivated to evade bifurcation. Rhode, *supra* p. 26, at 1206-07.

The parties may tacitly negotiate attorney's fees, violating the spirit of the bifurcated process, if not the letter. It has even been suggested that a ban on simultaneous negotiations "contributes to the very improprieties that the court [in *Prandini*] attempted to resolve." Note, *Conflicts, supra* note 6, at 813. Especially where damages are sought, "The bifurcated proceeding may *encourage* collusion between the attorneys in order to effectuate a practical settlement." *Id.* at 800 n. 12 (emphasis added). In other words, if the integrity of the nation's attorneys is not to be trusted, if collusion is an overwhelming temptation, and if the reviewing courts are powerless in the face of such abuse during simultaneous negotiations, then collusion is just as likely to occur during bifurcated proceedings.

Even for counsel of goodwill and integrity, there remains the problem of drawing a line clearly enough so that it can be understood and observed. A. Miller, *Attorneys' Fees In Class Actions: A Report To The Federal Judicial Center*, 223 (July 1980). The boundary line between a mere exchange of information as to the amount of attorney's fees thus far incurred, and outright negotiations in violation of the bifurcation rule, would be difficult to draw. *Moore*, slip op. at 24 n. 16. The enforcement problem was cited by those troubled by the *Prandini* rule in a survey conducted by Miller. *Supra* at 224.[8]

Nor should the impact of bifurcated proceedings on judicial economy be overlooked. The *Prandini* court was sensitive to the burden placed on courts to approve class action settlements under Rule 23(e) and was of the opinion that bifurcation "would make the court's task less burdensome. . . ." 557 F.2d at 1021. The reverse is true. Bifurcation doubles the number of hearings required to approve a class action settlement, thus increasing time, legal expenses and administrative burdens on the courts. Note, *Conflicts, supra* note 6 at 812.

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[8]Third Circuit judges interviewed following the *Prandini* decision had not been requested by a single plaintiff to enforce *Prandini* by instructing a defendant not to discuss fees simultaneously with the merits of the case. Some of the judges noted that simultaneous negotiations were as much in the plaintiff's interest as the defendant's. The judges labeled *Prandini* variously as "a pain," "stultifying" and a "tail wagging the dog." They read *Prandini* as applying narrowly only to its own fact pattern and, in one instance, felt it had been overruled by this Court's opinion in *White*. In short, *Prandini* has been routinely ignored in the only circuit where it has supposedly been in effect. This Court should not embark on a similar exercise in futility nationwide. Comment, *Settlement Offers, supra* p. 11, at 805 n. 90 and interview notes.

C. Defense Counsel In Many Instances, Has An Ethical Right And Duty To Engage In Simultaneous Negotiations.

This case has generated an unprecedented amicus response on the part of defense attorneys throughout the country. What is unprecedented is not the quantity, but the emotional intensity, of the responses. Government attorneys deeply resent having their conduct during negotiations labeled as "sweetheart deals" (or "bribes" or "collusion") on the one hand, and as "sacrifice" extractions (or "extortion," or "duress" or "coercion") on the other.

It is scant comfort to demonstrate, as we have done *supra* p. 10, that their conduct is "not unethical" under the Act. Rather, they perceive themselves as adhering to the highest ethical standards of their profession when they engage in simultaneous negotiations and make lump sum settlement offers or offers conditioned on a waiver of attorney's fees. The more recent, and better reasoned, federal court decisions are coming to this same conclusion.

In the first place, it is recognized that the "administration of justice" is best served by conscientious efforts to settle cases, including attorney's fees, short of litigation. Model Code DR 1-102(A) (5) (1981).

> Last, we should point to the overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved. In these days of crowded court calendars, complex disputes, and tardy results, there can be no doubt but that the voluntary resolution of litigation through settlement, constitutes the best quality of justice, and the highest service, that counsel can perform in the interest of his client and the administration of the

> judicial system. The removal of attorney's fees from the arena of voluntary and ethical negotations in civil rights cases would present an unnecessary discouragement to non-litigious disposition of these controversies.

Lazar, 757 F.2d at 440 (Torruella, J., concurring) (footnote omitted).

Ethical defense counsel, in attempting to provide "the best quality of justice" to the system and "the highest service" to his or her client, will often be required to engage in simultaneous negotiations because a "defendant may have good reason to demand to know his total liability from both damages and fees." *White,* 455 U.S. at 453 n. 15.

This principle holds true regardless of whether the case involves damages or injunctive relief.

> A settlement package of a civil rights action may consist of one or more of the following items: (1) monetary damages, (2) equitable relief, (3) costs and (4) attorney's fees. In settling a case for his client, a defendant's counsel does his client a disservice if he settles a case as to one or more of these items, but leaves open the possibility of further recovery or action on any of the remaining ones. Within the bounds of ethics and fair play, an attorney owes a positive duty to his client to reduce his liability and his exposure to recovery, to the limits of the attorney's ability. This applies to all the items as to which judicial relief can be sought.

Lazar, 757 F.2d at 439 (Torruella, J., concurring). This is the sore spot. Defense counsel who strive to "represent a client zealously within the bounds of the law" know that they owe their clients "a positive duty" to explore and limit all aspects of their clients' liability. Model Code,

Canon 7 (1981). They are incensed when, in carrying out that affirmative duty, they are reported to a bar committee for unethical conduct.

Nor is defense counsel's ethical conduct transformed into unethical behavior merely because it creates an ethical dilemma for plaintiff's counsel. To be sure, as this Court recently noted in the Rule 68 context, an offer of settlement "will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile," and may "serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer." *Marek*, 53 U.S.L.W. at 4906. But that is simply an inevitable fact of life when parties swap settlement offers.

> It has long been recognized that any agreement concerning plaintiff's attorney's fees, entered in the course of settling litigation, poses a danger of pitting the interests of the plaintiff in receiving a recovery against the interests of the plaintiff's attorney in receiving a fee. The tension between their interests exists even in the garden-variety tort cases in which the attorney has an agreement to receive a contingency fee at a stated fraction of the recovery.

Malchman, slip op. at 16 (Newman, J., concurring). Thus, potential ethical conflict between plaintiff and plaintiff's attorney is not the fault of defense counsel "in the garden-variety tort cases" when a common fund is at stake. Neither is it the fault of defense counsel in cases where "injunctive relief" is at stake, because "it is unrealistic to expect [the defendant] to agree to a settlement concerning the injunction terms until he knows the limit of his exposure for the attorney's fees." *Id.*

In short, settlement offers by defense counsel frequently pose ethical dilemmas for plaintiff's counsel. Ethical

counsel for plaintiffs and defendants cope with and resolve these dilemmas every day of the week in every law office across the land. In settling class action lawsuits, they routinely negotiate both the merits and the attorney's fees without any allegations of ethical misconduct. Indeed, the *Manual for Complex Litigation* expressly disapproves any other approach to class action settlements.

> Such an arrangement should not be permitted. All amounts to be paid by the defendant(s) are properly part of the settlement fund and should be known and disclosed at the time the fairness of the settlement is considered. . . . Only if the agreement of all payments to be made by defendants is disclosed in the proposed settlement can the class members and the court make any intelligent judgment about the fairness and reasonableness of a proposed settlement.

§ 1.46 (1982).

There is no reason to suspect that counsel in civil rights class action lawsuits are any less ethical than their counterparts in other areas of law. It is an "excess in paternalism" to suggest that the entire judicial settlement process is in need of overhaul to prevent unethical conduct on the part of civil rights counsel. *Lazar,* 757 F.2d at 439 (Torreulla, J., concurring). As this Court held in *Marek,* there is no evidence whatsoever "that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned." 53 U.S.L.W. at 4906.

D. District Courts Have The Necessary Tools To Uncover And Excise Unethical Conduct.

In those rare instances where unethical conduct may exist, "any unreasonable conduct that arises will be kept

in check through the district court's exercise of its Rule 16 and 23 powers if promptly brought to the court's attention." *Moore,* slip op. at 23 n. 14. However, the argument here must not be read as sanctioning or encouraging routine recourse to district court for exercise of its Rule 16 and 23 powers. The district court is not a mere bargaining chip on plaintiffs' side of the negotiating table, but an umpire of last resort when the rules of the game break down.

Thus, the services of the district court should be available to plaintiff's counsel only upon a showing that settlement offers by defense counsel have not been made in good faith. This means that the district court must not begin, as did the *Jeff D.* court and the dissent in *Moore,* with the attitude that "attorneys' fees settlements contained in simultaneously negotiated settlements [are] presumptively invalid absent 'unusual circumstances.'" *Moore,* slip op. at 23 n. 15. Put indelicately, this means, in the "sacrifice" context, that the court must not start with the presumption that defense counsel has been guilty of "extortion threats," or "coercion" or "duress."

Instead, the starting-point must be a presumption that defense counsel is engaged in good faith negotiations.

> The purpose of *defendants'* settlement offers which include fee provisions is not, in most cases, to create an attorney-client conflict. Nor is it to punish or deter plaintiffs' attorneys from taking on fee-shifting cases. Generally speaking, defendants make such offers to limit their total exposure; this could not occur in a bifurcated settlement process. This is true irrespective of whether the settlement involves monetary or injunctive relief. Fees and costs, always being monetary in nature, do not depend on the nature of the merits relief.

Id. at 21-22 n. 14, citing D.C. Circuit Report at 21-22 (emphasis in *Moore* opinion).

Plaintiff's counsel should have the burden of overcoming the presumption that defendants' settlement offers are made in good faith. In the "sacrifice" context, the burden would ordinarily be met when an offer, on its face, makes a "totally inadequate provision for class counsel." Rhode, *supra* p. 26, at 1207. Similarly, the burden would be met when defense counsel really has no defenses, e.g., where plaintiff's type of complaint has been frequently, and successfully, litigated in other jurisdictions. In such instances, defendant's insistence upon a waiver of attorney's fees as a condition for settlement on the merits may warrant exercise by the district court of its review powers under Rule 16 and 23.

Conversely, the district court should not allow itself to be drawn into the negotiating process on either side of the table when there is evidence that plaintiff's waiver of attorney's fees represents smart use of a bargaining chip in obtaining a *quid pro quo, Moore,* slip op. at 11; or when success on the merits is highly speculative if the case should go to trial; or when defendants of limited resources have voluntarily offered more relief than prayed for in the complaint. In all of these instances, waiver of attorney's fees by plaintiff's counsel may be seen as generating a result "bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and an appeal." *Saylor v. Lindsley,* 456 F.2d 896, 900 (2d Cir. 1972). The district court should also refrain from exercising its powers under Rule 16 and 23 when "neutralizing" elements, such as the

presence of objective third parties, safeguard the process, *Mendoza,* 623 F.2d at 1353.

When plaintiff succeeds in calling into question the good faith of defendant's settlement offers and when no obvious explanation of those offers is immediately forthcoming, then the district court is justified in exercising its powers under Rule 16 and 23 to determine whether such offers mask unethical behavior on the part of defendant. The court's powers, under those rules are adequate to deal with any problems that may arise, without recourse to *per se* rules that restructure the entire negotiation process.

For example, under Rule 23(e), the district court may preside over "an on-the-record conference to discuss the status of the case, including any particular dilemma involving simultaneous negotiations." *Moore,* slip op. at 25 n. 17. The district court may also use the services of a magistrate judge or of a special master to examine allegations of unethical conduct. *Manual for Complex Litigation* § 1.47 (1982). In addition, the court may appoint a guardian *ad litem* to protect the interests of plaintiffs if it becomes clear that a settlement offer has driven a wedge between those plaintiffs and plaintiff's counsel. *Haas v. Pittsburg Nat'l Bank,* 77 F.R.D. 382, 383 (W.D. Pa. 1977).

Similarly, in nonclass actions, plaintiffs may invoke Rule 16 to secure judicial scrutiny of settlement proposals. Rule 16(a) (5) allows the court, at its discretion, to conduct pretrial conferences to facilitate the settlement of cases. Under Rules 16(c)(7), the pretrial conference participants may consider or take action with respect to the possibility of settlement. These Rule 16 provisions per-

mit the court to intervene if it feels that conflict of interest problems are present in settlement negotiations. *See Moore,* slip op. at 6 (Wald, J., concurring). In addition, some authorities have suggested that district courts may exercise their discretion to reject settlements that undermine the congressional intent of the Act. Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988,* 55 U.Colo. L.Rev. 341, 358-359 (1984).

The existing rules of federal procedures thus provide both a powerful and a flexible mechanism for reviewing allegations of unethical behavior in the settlement process. In the class action context, Rule 23(e) is tailored to respect the fact that:

> [e]ach negotiation, like each litigant, is unique; reasonableness can only be determined by looking at the strength of the plaintiff's case, the stage at which the settlement is effective, the substantiality of the relief obtained on the merits, and the explanations of the parties as to why they did what they did.

Moore, slip op. at 5 (Wald, J., concurring).

Rather than devising inflexible prophylactic rules that impugn the integrity of the legal profession and the discretion of the district courts, appellate courts should insist that district court judges conscientiously perform their duties under the federal rules.[9] In particular, the Ninth

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[9]It bears repeating here that a district court's exercise of its powers under Rules 16 and 23 to intervene in the negotiation process should be a rarity. As this Court warned in *Hensley v. Eckerhart,* "a request for attorney's fees should not result in a second major litigation." 461 U.S. 424, 437 (1983). Even with $2.3 million in attorneys' fees on the table, the Second Circuit cautioned a district judge not to "convert settlement hearings into mini-trials on the merits." *Malchman,* 706 F.2d at 433.

Circuit's attempt to impose a *per se* rule requiring bifurcated negotiations should be rejected.

II.
The Court Of Appeals Erred In Enforcing The Merits Portion Of The Negotiated Settlement While Reversing The District Court's Approval Of The Attorney's Fee Waiver.

The Ninth Circuit Court of Appeals in the present case found, without examining the factual record, that the respondents were "prevailing parties" and entitled to attorney's fees under the Act. 743 F.2d at 650. Relying on the legislative history of the Act and this Court's opinion in *Hensley,* the appellate court reasoned that the district court was "obliged" to award attorney's fees. *Jeff D.,* 743 F.2d at 651. The Ninth Circuit then "reversed and remanded for determination of reasonable attorney's fees." *Id.* at 652. In doing so, the court failed to find that the district court abused its discretion either in approving the settlement or in denying respondents' request for attorney's fees. Rather, the Ninth Circuit voided the provision of the settlement whereby respondents waived the right to claim fees, left the remainder of the settlement intact, and prohibited the district court from exercising its discretion to determine whether respondents are entitled to attorney's fee on remand. In each of these actions, the Ninth Circuit committed reversible error.

A. The District Court Did not Abuse Its Discretion In Approving The Settlement.

The basic organizational structure of the federal judiciary requires that an appellate court give due deference and appropriate respect to the exercise of discretion by a trial court judge. *Webb v. Dyer County Board of Educa-*

tion, 53 U.S.L.W. 4473 (U.S. April 17, 1985). Under Rule 23(e) in particular, the district court protects unnamed or incompetent class members by determining whether a proposed settlement of a class action, taken as a whole, is fair, reasonable, and adequate to all concerned, and is not the product of fraud, overreaching or collusion. *Moore,* slip op. at 26; *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977).

In challenging court approval of a class action settlement agreement, an objector bears the burden of making a clear showing that the district court abused its discretion. *Moore,* slip op. at 27; *City of Detroit,* 495 F.2d at 455. Absent a strong showing that the district court abused its discretion, the court of appeals should not reverse. *Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco,* 688 F.2d 615, 626 (9th Cir. 1982), *cert. denied sub nom. Byrd v. Civil Service Comm'n of the City and County of San Francisco,* 459 U.S. 1217 (1983). "We are not to substitute our notions of fairness for those of the district judge and the parties to the agreement. . . . Consequently, we will reverse only upon a strong showing that the district court's decision was a clear abuse of discretion." *Id.* at 626.

As this Court stated in *Blum v. Stenson,* 104 S.Ct. 1541 (1984), "A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness. The court, with its intimate knowledge of the litigation, has a responsibility to encourage agreement." *Id.* at 1550 n. 19.

The Ninth Circuit in this case strayed far from these accepted standards of appellate review. Rather than reviewing the complex record before the district court and

ruling on that court's specific exercise of discretion under Rule 23(e) the appeals court ruled on a generic one-dimensional question more to its own liking:

> The question here is whether the court in reviewing a class action settlement in a civil rights action, properly approved the waiver of attorney's fees *simply because it was part of the settlement* to which the parties had agreed.

743 F.2d at 650 (emphasis added). The appeals court then answered that question in the negative and chastized the district court for its failure to perform its "duty to review the reasonableness of *all the terms* of class action settlement agreements, particularly those related to attorney's fees." *Id.* (emphasis added). A review of the record demonstrates that the district court did not approve the waiver "simply because it was part of the settlement," but rather because it found the proposed settlement, taken both as a whole and in all its individual terms, was fair, reasonable and adequate to all concerned and was not the product of fraud, overreaching or collusion. (J. A. 93-94).

The district court, at the time of its approval of the stipulation settling the controversy, had been in close contact with the case and the parties over a three-year period. Counsel for both parties actively negotiated attorney's fees and the merits of this case. (A. 5, 8-9, 16); *see supra* pp. 2-7. The language waiving attorney's fees incorporated in the consent decree settling the education claims, entered on October 19, 1981 (J. A. 54), was identical to that proposed *by respondents themselves* in their proposed stipulation of July 14, 1981. (A. 50). In reference to the proposed stipulation settling the remaining mental health claims and containing the same attorney's fees

waiver clause, attorney for respondents himself stated in a letter of November 30, 1981:

> It is my personal view that the negotiations conducted to date have been productive, fair with respect to our relative interests and marked by meaningful concessions from both sides.

(A. 18-19). The attorney's fee waiver language proposed by petitioners during the subsequent 1982-83 phase of the mental health negotiations mirrored that proposed by respondents during the 1981 mental health and education negotiations. (A. 18). The district court was fully advised of these negotiations and thoroughly reviewed the settlement and all of its components for reasonableness, fairness and adequacy at two separate hearings. (J. A. 88); *see supra* note 1. The final settlement decree in this case, by the Ninth Circuit's own admission, resulted in greater relief for the plaintiff class than the district court during earlier hearings had indicated it was willing to grant. *Jeff D.*, 743 F.2d at 650.

The programs made available to members of the plaintiff class are particularly expensive, with one involving average monthly costs of $43,000 to serve an average of twelve full-time and two part-time patients. Plaintiff's next friend was well aware of the limited financial resources at the disposal of defendant and bargained accordingly. (A. 10).

As early as April 3, 1981, counsel for defendants/petitioners had informed plaintiffs/respondents that:

> Any further concessions will be at the cost of services to other segments of its client population. . . . The state will not take service resources from other groups and tailor special programs for juveniles—programs requiring a high level of financial resources as mea-

> sured by limited populations and limited effectiveness.

(A. 9). Counsel for respondents in his letter of November 30, 1981, acknowledged that these concerns were in the forefront of the bargainers' minds during negotiations:

> Above all, I believe we have succeeded in resolving some very difficult points so as to place the minimum possible burden on the Department's [Department of Health and Welfare's] limited resources.

(A. 19). Based on the stipulation, the pleadings, the documents and the briefs filed with the court, as well as the oral arguments presented by both parties at two separate hearings, district court Judge Callister denied plaintiff's attorney's motion for fees and costs. (J. A. at 106).

A review of the record thus demonstrates that the district court in this case did not approve the waiver of attorney's fees "simply because it was part of the settlement to which the parties had agreed." 743 F.2d at 650.[10] On the contrary, the district court examined the prayer of relief in plaintiffs' complaint, the process of negotiations thereon, the likelihood of success if the case went to trial, and the relief voluntarily granted by defendant. In light of all these factors, the court concluded:

> I am of the opinion that it doesn't violate any ethical considerations for an attorney to give up his attorney

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[10]It is unfortunate that the Ninth Circuit's misstatement of the record in this regard has received such wide publicity. The *Moore* court distinguished its own case because "unlike *Jeff D.*, the trial court here conducted an extensive assessment of the reasonableness of all aspects of the settlement under Rule 23, including the waivers." The district judge in *Jeff D.* also performed his duties in a thorough manner.

> fees in the interest of getting a better bargain for his client.

(J. A. at 93).

In so ruling, the district court did not abuse its discretion. Rather an award of attorney's fees in this case would be patently unjust. Petitioners went to the bargaining table with the expectation that in exchange for various promises, respondents would not ask for attorney's fees; the district court had granted partial summary judgment eviscerating much of the complaint (J. A. 56); after the settlement was approved, this court ruled that the remaining state claims were beyond the jurisdiction of federal courts *Pennhurst v. Halderman,* 465 U.S. 89 (1984); even as to the "constitutional right to treatment" claim, the complaint failed to allege that the care violated the standard of generally accepted professional practice—the minimal requirement for relief as announced in *Youngberg v. Romeo,* 457 U.S. 307, 323 (1982); and the Ninth Circuit Court of Appeals recognized that the relief contained in the settlement was more than the district court would have granted at trial. *Jeff D.,* 743 F.2d at 649-50.

For the Ninth Circuit to reverse the district court's ruling that upheld the waiver of attorney's fees by plaintiff, without ever reviewing the factors that went into that ruling and without finding that the district court abused its discretion, is plain error.

B. The Court Of Appeals Erred By Forcing Petitioners To Abide By Their Settlement On The Merits While Directing The District Court To Award Attorney's Fees To Respondents On Remand.

The Ninth Circuit Court of Appeals compounded its error of reversing the district court on the attorney's fees

issue by directing the district court on remand to award "reasonable attorney's fees" while leaving intact the settlement on the merits. In doing so, the Ninth Circuit neatly robbed the petitioners of their *quid pro quo*. Petitioners' settlement offer on the merits was conditioned on a waiver of respondents' attorney's fees precisely because the relief granted to the plaintiff class was more than that sought by its attorneys and more than the district court had indicated it was willing to grant if the case had gone to trial.

The Ninth Circuit's decision would do to the petitioners what the district court could not itself do in reviewing a proposed settlement under Rule 23(e). The district court, reviewing a proposed settlement under Rule 23(e), is cautioned not to try the case or reach any ultimate conclusions on contested issues of fact and law that underlie the merits of the dispute. *Grunin*, 513 F.2d at 123; *City of Detroit*, 495 F.2d at 456; *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971). Instead, the district court must approve the entire settlement or reject it; the court is not free to pick and choose, leaving some elements of the negotiated settlement in place, while redrafting others to its own satisfaction. This was clearly the understanding of Judge Calister at the Rule 23(e) hearing held on April 28, 1983.

> [T]he state was not willing to concede that they were obligated to do the things that they were doing . . . but they were willing to do them as long as their costs were outlined and they didn't face additional costs, but they indicated that they only submitted upon the stipulation that there would be no attorney's fees paid.
>
> My viewpoint is that they are in a position to say, if I say attorney's fees will be allowed, to withdraw the stipulation and put us to trial . . . .

(J. A. at 93).

The court later took the extraordinary step, on August 29, 1983, of sending a letter to Mr. Johnson, explaining why the provisions of the settlement agreement were not severable:

> The defendants entered into the stipulation only as a compromise matter with the understanding that they would not pay any attorneys fees and advised the court that if there was going to be attorneys fees that they wanted to proceed to trial because they did not think they were required to conform to the stipulation legally. Under those circumstances, it would be entirely inappropriate to leave the stipulation in effect.

(J. A. 115). Similarly, on appeal, the appellate court must consider the effect of the settlement as a whole and is not free to delete, modify or substitute certain provisions of the settlement. "The agreement of the parties must stand or fall as a whole." *Cotton*, 559 F.2d at 1331-1332.

Allowing modification of the settlement as was done by the Ninth Circuit in this case, violates the congressional scheme of providing for relief for civil rights violations and encouraging settlements. The D. C. Circuit Court of Appeals recently rejected the suggestion that either a district or an appellate court can modify individual components of a package settlement:

> a court need not compound error by *unilaterally* modifying a settlement which originally contemplated payment of *no* fees. The rule Moore advocates would result in the alteration of a material part of the Consent Decree which was a condition to its very acceptance by NASD. Granted, a court may modify a fee award, under its authority to oversee such awards, where the parties contemplated payment of reasonable attorneys' fees. It does not follow, though, that a court should necessarily *impose* a fee award where the parties ex-

> pressly waived fees. To do so would undermine the settlement process.

Moore, slip op. at 34-35 n. 21 (emphasis in original). The Ninth Circuit would allow civil rights plaintiffs to seduce defendants into settling with the promise of a fee waiver, knowing that the terms of the settlement may be unilaterally rewritten by the district or appellate court to expunge the waiver while leaving the remainder of the "settlement" intact.

C. The Court of Appeals Erred by Depriving The District Court Of Its Discretion To Award Or Deny Attorney's Fees On Remand.

The Ninth Circuit in this case remanded the matter to district court "for determination of reasonable attorney's fees." *Jeff D.,* 743 F.2d at 652. The Ninth Circuit thereby violated a fundamental principle of the Act which states that an award of attorney's fees is not mandatory but rests in the sound discretion of the district court. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 416 (1978).

In two previous cases, this Court recognized that the Act's authorization of attorney's fees is not absolute and that a denial of fees should be upheld if an award is "unjust" or "unfairly surprises or prejudices" the opposing party. *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968); *White,* 455 U.S. at 454.

Two lower courts have upheld denials under this standard in similar circumstances. In *Stover,* 624 F.2d 127, the settlement was silent on the issue of fees. The court remanded the case for a factual inquiry as to whether the parties intended to include fees in the agreement or whether the plaintiffs misled the defendants, which might

constitute a "special circumstance" under *Piggie Park*. *Id.* at 132. In *Lazar,* notwithstanding a waiver provision in the settlement, the plaintiffs moved for attorney's fees. The court upheld the denial of attorney's fees because plaintiff's counsel had misled the opposing parties to obtain the settlement on the merits. The court held that such conduct amounted to "a 'special circumstance' in which a prevailing plaintiff should not recover fees." 757 F.2d at 439.

The *Lazar* court observed that if plaintiff's counsel had ethical concerns, he could have sought guidance from the district court. *Id.* at 437. In the instant action, the parties sought such guidance and, as the Ninth Circuit itself acknowledges, "plaintiffs' counsel did indicate willingness to forgo [sic] fees if the court approved." 743 F.2d at 650. The district court, relying on this announced willingness of plaintiff's counsel to waive his attorney's fees in exchange for a "better bargain for his client" (J. A. at 93), found the waiver ethically acceptable and approved the stipulation. (J. A. 93-94, 106).

The Ninth Circuit summarily declared plaintiffs to be "prevailing parties" and prevented any inquiry on remand into the propriety of plaintiff counsel's conduct on the ground that "The principle that generally binds lawyers and litigants to stipulation has limited applicability to the present situation . . ." 743 F.2d at 650. The Ninth Circuit grounded this startling ruling only on "the clear public policy of 42 U.S.C. 1988 to award reasonable attorney's fees in civil rights actions. *See Hensley v. Eckerhart*, 103 S.Ct. at 1937." *Id.*

The reasoning of the *Lazar* court is more persuasive. *Hensley* does not stand for the proposition that attorney's fees are mandatory in all civil rights actions, much less for the proposition that attorney's fees cannot be waived in exchange for a better bargain for one's clients. Indeed, *Hensley* expressly recognizes that "special circumstances" may exist justifying denial of attorney's fees entirely. 461 U.S. at 429. Thus if this court determines that the present case must be remanded to district court, it should allow that court to exercise its full discretion in determining whether plaintiff is a "prevailing party" at all, and, if so, whether plaintiff's counsel's conduct nonetheless amounted to a "special circumstance'' warranting denial of attorney's fees.

—o—

CONCLUSION

This Court should reverse the Ninth Circuit Court of Appeals on all counts and reinstate the district court's order approving the stipulation settling the mental health claims, including respondent/plaintiffs' attorney's fee waiver. In so doing, this Court should determine that simultaneous negotiations of the merits and attorney's fees are proper when ethically conducted and should be presumed to be so absent a showing to the contrary.

If this Court should hold that simultaneous negotiations are improper, then petitioners/defendants must be allowed to either return to the bargaining table or to determine the controversy at trial. Under no circumstances should this Court permit the settlement as to the merits

to be severed from that on attorney's fees with a subsequent expansion of attorney's fee liability. Only by knowing the total extent of their liability will defendants be encouraged to settle civil rights disputes.

Respectfully submitted,

*James Thomas Jones
Attorney General
State of Idaho
John J. McMahon
Chief Deputy
Michael De Angelo
James Wickham
Deputy Attorneys General
Statehouse
Boise, Idaho 83720
Phone: (208) 334-2400
Counsel for Petitioner

*Counsel of Record

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CASE NO. 80-4091

STIPULATION

COME NOW the parties to the above-entitled action, by and through their respective counsel, and hereby stipulate as follows:

* * *

12. Defendants Idaho State Department of Health and Welfare, Milton G. Klein, George Bachik and Carroll Elmore stipulate and agree to:

a. Prohibit the admission to State Hospital South of Plaintiffs under seventeen (17) years of age, or members of the class they represent under seventeen (17) years of age, committed to the Idaho State Department of Health and Welfare under the Youth Rehabilitation Act and the Child Protective Act.

b. Prohibit the admission of Plaintiffs, or any individual, under seventeen (17) years of age to State Hospital South under any other authority, unless: there is a court order authorizing admission for purposes of examination, or there is a certificate of a designated examiner, as defined in Title 66, Chapter 3, Idaho Code, determining that admission to State Hospital South is appropriate for the clinical needs of such individual.

c. Encourage the development of community psychiatric facilities through the planned facility at the North Idaho Children's Home.

d. For each plaintiff admitted to State Hospital South, develop an individualized treatment plan meeting the requirements of "Rules Governing Hospitals," Title 2, Chapter 1, Rules and Regulations of the Department of Health and Welfare.

e. Provide treatment and related services to each individual admitted pursuant to paragraph 12(b) to State Hospital South as recommended by the individualized treatment plan.

f. Discharge all plaintiffs and the class they represent not admitted in accordance with the provisions of paragraph 12(b) on or before December 31, 1981.

13. Each party shall bear all costs and attorneys fees incurred in this action.

DATED this —— day of March, 1981.

March 26, 1981

Jim Wickham
Steve Berenter
Deputy Attorney Generals
450 W. State Street, 7th Floor
Boise, Idaho 83720

Re: *Stipulation in Jeff D. v. Evans*

Dear Mr. Berenter and Mr. Wickham:

You will find enclosed the STIPULATION enlarging time to respond to Motion for Preliminary Injunction.

I have reviewed your copy of the STIPULATION in settlement of this controversy. The good news is that the

Education portion is basically agreeable and the bad news is that the Health and Welfare portion is insufficient, at this point, for stipulation.

First, the good news on the Education portion. There are three minor changes that must be made, and these are as follows: First, there must be a limitation as to the number of students in each class. This could be included in paragraph 11(d) of your stipulation by the addition of a paragraph "v. class size and number of students per teacher." Second, there must be included a paragraph to encourage transfer of students to the less restrictive environment of a school district with all deliberate speed. I propose the insertion of language similar to paragraph 4 E(6) and E(7) of my stipulated Consent Decree, to be added as a new paragraph 11(f) to your Stipulation as follows:

> Defendants shall seek out and develop educational services in the community schools of the local school districts for plaintiffs who are able to take advantage of such educational services with the goal of providing such educational services to the plaintiff class in the community schools of the local school districts as soon as practical. Thus, Defendants shall advise the local school districts of the number of school-age plaintiffs being prepared for transfer to the community schools and shall supply the local school districts a projected timetable for such transfers.

Third, a new paragraph 11(g) should be added (to protect the Department of Education) as follows:

> The Department of Education shall ensure the establishment of the grievance procedure, with surrogate parents where appropriate, as required by the Education for All Handicapped Childrens Act, (20 U.S.C. § 1401 et seq.; see e.g. 20 U.S.C. § 1415 and 45 C.F.R.

parts 84 and 121 a.504 through 512 regarding the grievance procedure, and 20 U.S.C. § 1415 and 45 C.F.R. part 121 a.514 regarding surrogates) now or as hereinafter amended to ensure that, in any case, there is some method for addressing problems in each individual's Individual Education Plan. All complaints with an individual education plan will be processed using this procedure. However, all complaints that reflect problems of the plaintiff class that are addressed in this Stipulation may be placed before this court for resolution, by contempt sanction or otherwise.

Second, as to the Idaho State Department of Health and Welfare, there are rather significant problems. To wit:

First, after much consideration and research, I have decided that the minimum basic age for placement of juveniles at State Hospital South (paragraph 12a in your stipulation and paragraphs 4A1 and 2 in my stipulation) must be eighteen (18) years of age (see e.g. Idaho Code § 66-318). However, I am willing to consent to those younger than eighteen (18) years being there in exceptional circumstances. These are: a court order, which authorizes placement at State Hospital South *and* a certificate of a designated examiner, as defined in Title 66, Chapter 3, Idaho Code, determining that State Hospital South is the only appropriate placement for the individual.

Second, (and related to the above) there must be segregation of those under age twenty-one (21) from those over age twenty-one (21) as discussed in paragraph 4(A)(2) of my Stipulated Consent Decree and the Preliminary Injunction.

Third, the provisions of paragraph 4(B) (1), 2(b) only, 3 and 4 of my Stipulated Consent Decree, and paragraph

12(f) of your Stipulation (as amended by this letter) must be included in any Stipulation. This will provide some timetable for providing services to these juveniles.

Fourth, for purposes of encouraging this settlement only, I am willing to drop my paragraphs 4(C) and 4(D) except for paragraphs 4(C) (2) (g), (h) and (j) and 4(D) (1), (5) and (6) in exchange for your paragraph 12(d).

Fifth, there must be included in the Stipulation paragraph 4(F) of my Stipulated Consent Decree, or a reasonable provision reflecting these provisions.

Lastly, as to both your clients, the provision contained in paragraph 4(G) of my Stipulated Consent Decree, or a reasonable alternative, must be included. In light of these problems, there can be no Stipulation on your paragraph 13 at this time.

Please let me know your response to these proposals within five (5) days of your receipt of this letter. I will, at that time, decide whether further negotiation is possible or whether the Preliminary Injunction Motion should be noticed for hearing.

Please be advised, however, that I am willing to entertain a Partial Consent Decree on certain issues involving all the parties.

If you have any questions or comments, please call or write.

Sincerely,

/s/ Charles Johnson
Attorney for Plaintiffs

Through the desk of:

/s/ Russell E. Webb
Attorney for Plaintiffs

A. 6

April 3, 1981

Charles Johnson, Esq.
Idaho Legal Aid Servces, Inc.
P. O. Box 1136
Idaho Falls, Idaho 83401

Dear Charlie: RE: Jeff D. v. State

As I read your letter of March 26, 1981, you are demanding:

> (1) No admissions to State Hospital South (SHS) of persons under eighteen (18) years of age without court authorization and a designated examiner's certificate that placement at SHS is the *only* appropriate placement.

This ignores the duty of parents to secure needed care for their dependent children; it ignores the duty of the state to seek private arrangements in lieu of formal intervention through commitment; it ignores the fact that placement at SHS may be the best placement in light of the paient's clinical needs even though SHS will never be the *only* appropriate placement; it ignores the months of debate involved in the development of Senate Bill 1019. Even the *Pennhurst* court allowed institution placements on a voluntary basis and where clinically appropriate.

> (2) Total segreation of patients over and under tweuty-one (21) years of age.

A more arbitrary demand would be difficult to imagine. The age of twenty-one has no relation to legal majority, or to clinical effectiveness. Why not segregation of those over and under eighteen, the age of majority; over and under twenty-two (22), the age extinguishing the duty to educate; over and under sixty-two (62), the age of retirement; if sex is a hang-up, why not over and under forty-five (45), the age of menopause? It ignores the clinical

and physical resourcese at SHS. The demand dequires separate clinical, living, recreational and all other resources. Your letter indicates much research—if our legal position is as poor as you apparently believe, I would appreciate knowing of the authorities so that we can avoid future litigation. Other than 16-1812A, *Idaho Code* [which is directly rebutted by 16-1832(c)], your brief in support of your motion for preliminary injunction did not include a single authoritative reference. Integration of patients will be one of the factors considered in determining the appropriateness of placement at SHS.

(3) A full range of community-based services.

As indicated by our proposed stipulation transmitted to you March 23rd, the Department of Health and Welfare is committed to continue providing a full range of community services for juveniles and to develop in-patient psychiatric services through the NICH facility. Any other in-patient psychiatric services will require amendments of the state's Medicaid plan and/or Title XIX of the Social Security Act. In our discussions, it was felt that the NICH facility would satisfy your demands for in-patient psychiatric facilities.

(4) Return of out-of-state children by December 30, 1984.

It is unlikely that the state will ever have the capability of providing unique facilities for all the needs of children such as those currently placed out of state. Moreover, since under 94-142 and 504 the state must contract with out-of-state facilities to provide related services unavailable in-state, it is, in my opinion, unlikely that the court will absolutely prohibit the use of out-of-state facilities. Again, if you have any authority to the contrary, I will be glad to re-evaluate my position.

(5) Development of a full-range of community-based services.

Again, with the exception of in-patient psychiatric facilities, our discussions have given us no indication of other services not provided.

(6) Quarterly review of Individualized Treatment Plans (ITP) with patient involvement, discharge plans; ITP assessment of placement and ITP release criteria.

I am advised that the ITP's are reviewed monthly and that the clinical record, of which the ITP is a portion, includes this material. Perhaps if there is a specific problem with these items we can address it rather than argue about something that is already provided.

(7) Incident reports.

There is no objection to putting copies of incident reports in the clinical records, although the progress notes contain the same information.

(8) ITP's developed by child psychiatrists and/or psychologists.

Due to the lack of child psychiatrists and psychologists, the state is unable to comply with this demand. Moreover, since admission will be limited to those for whom services at SHS are appropriate, this demand would appear unnecessary.

(9) Indefinite reporting.

While the state is willing to make reports until compliance with any time table, it would be unreasonable to require semi-annual reports in perpetuity.

(10) Attorneys fees and costs.

If you desire to preserve your right to seek fees and costs in the unlikely event enforcement proceedings are required, the state is willing to modify its position to the ef-

fect that all parties bear their own costs and fees thus far incurred.

Charlie, I believe the state has made some major concessions as a result of this action. Not only will it no longer admit youth rehab. and child protection children so long as SHS has no juvenile psychiatric services, but it has increased its emphasis on providing mental health services to kids. Any further concessions will be at the cost of services to other segments of its client population. The state will not reduce the number of adult psychiatric beds necessitated by a demand for segregation. The state will not take service resources from other groups and tailor special programs for juveniles—programs requiring a high level of financial resources as measured by limited population and limited effectiveness.

It appears in the best interest of all parties to initiate a dialogue to resolve any remaining issues. Perhaps it would be beneficial to meet with you and Mr. Webb, Mr. Bachik, Carroll Elmore and Mr. Antram to discuss the problems involved in this process.

Sincerely,

/s/ James Wickham
Deputy Attorney General

May 15, 1981

James Wickham
Steve Berenter
Deputy Attorney Generals
Boise, Idaho 83720
Re: *Jeff D. v. Evans,* Case No. 80-4091

Dear Mr. Wickham and Mr. Berenter:

Mr. Wickham will find enclosed the original and Mr. Berenter will find enclosed a copy of the revised Stipulation

and Consent Decree in this matter. In light of the negotiations and communications that I have had with each of you to date, a final total settlement of this controversy involving all the parties is possible. The enclosed resulting document is self-explanatory; however, I will address in this letter two concerns that may, to each of your departments, prevent settlement.

In my conversations with Mr. Wickham on May 7, 1981, the changes that I made in the Stipulation were discussed. Most of these changes presented and should present little or no difficulty. However, Mr. Wickham indicated that the Idaho State Department of Health and Welfare is unable or unwilling to provide board certified child psychiatric professionals to the plaintiff class, not only for treatment purpos s, but also for evaluation purposes leading to the establishment of a treatment plan. Obviously, without these specialists, what treatment that is made available will be questionable at best. Equally obvious, however, is the lack of resources in the State of Idaho. By way of compromise, the plaintiff class is willing to stipulate that a board certified child psychiatric professional only be required for evaluation purposes leading to the establishment of a treatment plan; and hence, only a person who "specializes" in the area of child psychology (without any other credentials or board certification) be required for the actual treatment purposes. See e.g. paragraphs 12.d.1 and 12.e.1 respectively.

• • •

In summary, at present the position of your respective departments is that they are either unable or unwilling to: (1) provide specialists in child psychiatric treatment to

even formulate the treatment plans of the plaintiff class and (2) accept any responsibilities at all for the education of the members of the plaintiff class that are placed outside the State of Idaho (the Department of Education should note that this is a very limited responsibility which will diminish over time as the Stipulation is implemented). These are very fundamental issues going to the very heart of the "right to appropriate treatment and education in the setting least restrictive of personal liberty" which is the subject of this lawsuit. Therefore, the plaintiff class would suggest that if there can be no stipulation on these issues at this time, that these issues be litigated, by summary judgment if possible, after a Stipulation on the remaining issues (paragraph 10 of the Stipulation could be changed to reflect this arrangement).

I personally feel that the enclosed Stipulation reflects a fair accommodation between the parties on current law and should be signed in the best interest of Idaho's youth. It is my sincere hope that your respective departments will agree.

If you have any questions or comments, please call or write.

Sincerely,

/s/ Charles Johnson,
Attorney at Law

June 16, 1981

Mr. Charles Johnson
Idaho Legal Aid Services, Inc.
P.O. Box 1136
Idaho Falls, Idaho 83401

Re: Jeff D. vs. Evans

Dear Charlie:

You have asked for a description of the items which the Department of Health and Welfare wishes to discuss at the meeting of June 23rd.

1. Paragraph 11(b)(i). DH & W is concerned that this provision will encourage local school districts to stop payment of the educational services associated with out-of-state placements.

2. Paragraph 12(a). DH & W is concerned that this paragraph will impede the development of inpatient community psychiatric facilities. Local facilities cannot be expected until they perceive a need for specialized units. The prohibition on admissions might delay the development of this resource.

3. Paragraph 12(b). DH & W has a variety of concerns on the protection issue, not the least of which is that segregation may not be the most efficient way to resolve the case. This provision does not address the situation when the juvenile is the aggressor. Nor does it address any due process interests.

4. Paragraph 12(c)(1). DH & W is unable to warrent the "implementation" of the NICH facility.

5. Paragraph 12(d). It would seem unreasonable to require all facilities to develop hospital treatment plans.

6. Paragraph 12(d)(1). Inclusion of an adolescent specialist in the development of the ITP may not be the most effective means of ensuring availability of specialized services.

7. Paragraph 13(e). Any DH & W settlement is conditioned on non-liability for costs and fees thus far received.

Sincerely,

/s/ James Wickham
Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 80-4091

STIPULATION AND CONSENT DECREE

COMES NOW the parties to the above-entitled action, by and through their respective counsel, and hereby stipulate as follows:

1. This is a class action for declaratory and injunctive relief on behalf of the named Plaintiffs and the class they represent consisting of all Idaho children under the age of twenty-one (21) who now or will in the future, suffer from emotional or mental handicaps and who are, or will in the future, be institutionalized or otherwise placed in residential programs of Defendants. Plaintiffs and the class they represent seek relief from the Defendants' alleged failure to provide adequate or appropriate treatment and educational programs in the least restrictive setting in violation of Plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution;

Article I, Section One, Thirteen and Eighteen, and Article X, Section One of the Constitution of the State of Idaho; the Community Mental Health Centers Act (42 U.S.C.A. 2661); the Rehabilitation Act of 1973 (29 U.S.C.A. 794); the Education for all Handicapped Children Act (20 U.S.C.A. 1401); the Developmental Disability Assistance and Bill of Rights Act (42 U.S.C.A. 6000); the Idaho State Education of the Handicapped and Others Unable to Attend School Statutes (Idaho Code Section 33-2001); and the Idaho Youth Rehabilitation Act (Idaho Code Section 16-1800).

The named plaintiffs and the class they represent have property and liberty interests, secured under these federal and state laws, to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and with the goal of providing these plaintiffs with the opportunity to develop their full potential.

• • •

13. General Provisions:

a. Placements of plaintiffs and the class they represent shall be in their respective family homes. All other placements shall be in the available setting least restrictive of individual liberty consistent with the clinical or educational needs of such plaintiff. Notwithstanding, the defendants shall act in concert, in all cases and whenever necessary, to help ensure the delivery of appropriate mental health and educational services to members of the plaintiff class in an individually appropriate setting that is least restrictive of personal liberty within the State of Idaho.

b. The Defendants shall, on September 1, 1982, and every year thereafter for five years or until the court otherwise so orders (see below), file a report with the above-entitled court, with a copy to plaintiff's counsel of record; such report shall detail the extent of Defendant's compliance with this Consent Decree, and the future plans for compliance with this Consent Decree.

c. The parties will attempt to reconcile any difficulties with the implementation of this Consent Decree. The plaintiff class or their representatives (next friend or Idaho Legal Aid) shall have the power to submit any dispute under this Consent Decree to the above-entitled court for decision by contempt sanction or otherwise, should reconciliation fail.

d. The Court will retain jurisdiction over this action for five (5) years or until the court is satisfied by stipulation or otherwise, that the actions and omissions complained of herein no longer exist and will not reoccur.

e. All parties shall bear their own attorney's fees and costs thus far incurred.

DATED this ——— day of ————————, 1981.

October 13, 1981

James R. Wickham, Esq.
Deputy Attorney General
450 West State Street, 7th Floor
Boise, Idaho 83720

Re: *Jeff D. v. Evans,*
Case No. 80-4091

Dear James:

You will find enclosed copies of two letters. These indicate that I will not Stipulate to an extension of time

in the hearing set in this matter and that I will settle independently with the Department of Education.

My position is that I have been more than reasonable in my settlement offer. Anything less would be a severe disservice to the children and in my opinion a fraud on these children and the court. I think you probably agree. In fact, I thought the matter had been settled.

In any case, the reason I am writing is to purpose [sic] a meeting in Boise on October 16, 1981, between myself and all defendants to try to settle this case once and for all. If this can be arranged, please contact me so we can arrange a time and place.

In the meantime please be advised that I am preparing for a full adversary hearing on October 19, 1981. I intend to do everything in my power to "win" my motions. If I go through with this hearing there will be no Stipulation on the issue of attorney's fees.

If you have any questions or comments, please call or write.

In the best interests of Idaho's emotionally disturbed children,

/s/ CHARLES JOHNSON

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 80-4091

STIPULATION AND CONSENT DECREE FOR PROVISION OF MENTAL HEALTH SERVICES; AND ORDER

COMES NOW the Plaintiffs in the above-entitled action and Defendants Thomas L. Purce, George Bachik and

Carroll Elmore, by and through their respective counsel, and hereby stipulate as follows:

• • •

10. General provisions:

a. Placement of plaintiffs and the class they represent shall be in their respective family homes. All other placements shall be in the available setting least restrictive of individual liberty consistent with the clinical needs of such plaintiff. Notwithstanding, the defendants shall act in concert, in all cases and whenever necessary, to held, [sic] insure the delivery of appropriate mental health and educational services to members of the plaintiff class in an individually appropriate setting that is least restrictive of personal liberty within the State of Idaho.

b. The Defendants shall, on September 1, 1982, and every year thereafter for five (5) years or until the court so orders (see below), file a report with the above-entitled court, with a copy to plaintiff's counsel of record; such report shall detail the extent of Defendant's compliance with this Consent Decree, and the future plans for compliance with this Consent Decree.

c. The parties will attempt to reconcile any difficulties with the implementation of this Consent Decree. The plaintiff class or their respectives (next friend or Idaho Legal Aid) shall have the power to submit any dispute under this Consent Decree to the above-entitled court for decision by contempt sanction or otherwise, should reconciliation fail.

d. The Court will retain jurisdiction over this action for five (5) years or until the court is satisfied by

stipulation or otherwise that the actions and omissions complained of herein no longer exist and will not recur.

e. All parties shall bear their own attorney's fees and cost thus far incurred.

DATED this —— day of ————, 1981.

IDAHO LEGAL AID SERVICES, INC.
Mental Disability Law Unit
400 N. Eastern Ave. - P.O. Box 1136
Idaho Falls, Idaho 83401
(208) 523-0043

November 30, 1981

Mr. James Wickham
Deputy Attorney General
450 W. State Street - 7th Floor
Boise, Idaho 83720

Re: *Jeff D. v. Evans*

Dear Mr. Wickham:

In accordance with your request, I have again reviewed your draft stipulation which resulted from our September meeting in Boise. I find that we are very close on the vast majority of the covered issues. The following comments are made with a view toward favorably concluding our discussions, and are based on your most recent draft stipulation.

• • •

It is my personal view that the negotiations conducted to date have been productive, fair with respect to our relative interests, and marked by meaningful concessions from

both sides. Above all, I believe we have succeeded in resolving some very difficult points so as to place the minimum possible burden on the Department's limited resources.

Frankly, I think neither of the parties has any bona fide excuse for failing to achieve a final settlement at this point in time. The above points are presented to you as a step toward that goal rather than away from it.

I will be most happy to personally discuss this further with agency officials if need be, and encourage you to give me your earliest, frank assessment of the status of these few remaining questions.

Sincerely,

/s/ Russell E. Webb
Managing Attorney

Supreme Court, U.S.
FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN V. EVANS, *et al.*,
Petitioners,

v.

JEFF D., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

May a court, consistent with the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, and the federal Constitution, enforce a complete waiver of plaintiffs' right to costs and attorney's fees under § 1988, where the waiver is exacted by state defendants on the eve of trial as a condition to a settlement providing substantial injunctive relief on the merits.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	12
I. THIS CASE CONCERNS COERCIVE REQUESTS FOR FEE WAIVERS IN CIVIL RIGHTS CASES, NOT A PER SE RULE BARRING SIMULTANEOUS NEGOTIATION OF THE MERITS AND ATTORNEY'S FEES	12
II. IN ENACTING SECTION 1988, CONGRESS DETERMINED THAT AWARDS OF ATTORNEY'S FEES WERE ESSENTIAL TO PRIVATE ENFORCEMENT OF CIVIL RIGHTS LAWS	15
III. PETITIONERS WERE ABLE TO EXACT A FEE WAIVER BY IMPROPERLY CREATING AND EXPLOITING A CONFLICT OF INTEREST BETWEEN RESPONDENTS AND THEIR COUNSEL	18
IV. THE COURT OF APPEALS PROPERLY INVALIDATED THE FEE WAIVER AS CONTRARY TO SECTION 1988 AND THE PUBLIC POLICIES IT EMBODIES	24
A. The Fee Waiver In This Case Contravened Section 1988 And Its Underlying Purposes, And The Court Of Appeals Correctly Invalidated It	24

TABLE OF CONTENTS—Continued

Page

B. Petitioners' Alternatives To The Approach Of The Court Of Appeals Would Not Resolve The Problems Posed By The Coerced Fee Waiver 30

C. The Court Of Appeals Correctly Declined To Invalidate The Entire Settlement Agreement 33

V. BARRING COERCED FEE WAIVERS WOULD NOT INTERFERE WITH THE LEGITIMATE INTERESTS OF DEFENDANTS IN SETTLING CIVIL RIGHTS SUITS.. 35

CONCLUSION 39

TABLE OF AUTHORITIES

CASES Page

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 15
Blum v. Stenson, 104 S. Ct. 1541 (1984) 37
Bounds v. Smith, 430 U.S. 817 (1977) 24
Boyd v. Bechtel Corp., 485 F. Supp. 610 (N.D. Cal. 1979) 30
Chicano Police Officer's Association v. Stover, 624 F.2d 127 (10th Cir. 1980) 38
Clanton v. Allied Chemical Corp., 409 F. Supp. 282 (E.D. Va. 1976) 26
Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985) 35
Cooper v. Singer, 719 F.2d 1496 (10th Cir. 1983) .. 17, 28-29, 30
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 20
Edwards v. Arizona, 451 U.S. 477 (1981) 20
El Club Del Barrio, Inc. v. United Community Corps., 735 F.2d 98 (3d Cir. 1984) 28, 34
Foster v. Boise-Cascade, Inc., 420 F. Supp. 674 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978) (per curiam) 30
Freeman v. B&B Associates, 595 F. Supp. 1338 (D.D.C. 1984), *appeal docketed*, No. 85-5239 (D.C. Cir. Mar. 11, 1985) 19, 20
Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980) 29
Gillespie v. Brewer, 602 F. Supp. 218 (N.D. W. Va. 1985) 10, 21, 28, 30, 33
Gram v. Bank of Louisiana, 691 F.2d 728 (5th Cir. 1982) 38
Hensley v. Eckerhart, 461 U.S. 424 (1983) 9, 32, 34-35, 37
Hutto v. Finny, 437 U.S. 678 (1978) 32
James v. Home Construction Co. of Mobile, 689 F.2d 1357 (11th Cir. 1982) 21, 28
Jeff D. v. Evans, 743 F.2d 648 (9th Cir. 1984) .... *passim*
Johnson v. Avery, 393 U.S. 483 (1969) 24

TABLE OF AUTHORITIES—Continued

	Page
Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1929 (1984)	10, 11, 30, 33
Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985)	20-21, 25, 29
Leeds v. Watson, 630 F.2d 674 (9th Cir. 1980)	17
Lefkowitz v. Turley, 414 U.S. 70 (1973)	20
Leisner v. New York Telephone Co., 398 F. Supp. 1140 (S.D.N.Y. 1974)	26
Lisa F. v. Snider, 561 F. Supp. 724 (N.D. Ind. 1983)	28
Maher v. Gagne, 448 U.S. 122 (1980)	9, 34
McBrearty v. United States Taxpayers Union, 668 F.2d 450 (8th Cir. 1982) (per curiam)	10, 26
Mid-Hudson Legal Services, Inc. v. G&U, Inc., 578 F.2d 34 (2d Cir. 1978)	29
Mitchell v. Johnston, 701 F.2d 337 (5th Cir. 1983)	28
Moore v. National Association of Securities Dealers, Inc., 762 F.2d 1093 (D.C. Cir. 1985) (petition for rehearing pending)	20, 29
Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978)	34-35
New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980)	17
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam)	17, 34
Obin v. District No. 9 International Association of Machinists, 651 F.2d 574 (8th Cir. 1981)	21
Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)	7
Regalado v. Johnson, 79 F.R.D. 447 (D. Ill. 1978)	21
Sanchez v. Schwartz, 688 F.2d 503 (7th Cir. 1982)	29
Shadis v. Beal, 685 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 970 (1982)	10, 11, 27-28, 33
White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982)	21, 36
Williams v. Illinois, 399 U.S. 235 (1970)	24

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES Page

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982) ..... *passim*
Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997-1997j (1982) 17
Equal Access to Justice Act, 28 U.S.C. § 2412 (1982) 36
28 U.S.C. § 2412(d)(1)(B) 36
Legal Services Corporation Act, 42 U.S.C. § 2996-2996*l* (1982) 3
42 U.S.C. § 2996(6) 19
42 U.S.C. § 2996f(b)(1) 3
28 U.S.C. § 1927 (1982) 38
45 C.F.R. § 1609 (1984) 3
Fed. R. Civ. P. 11 38
Fed. R. Civ. P. 12(b)(6) 38
Fed. R. Civ. P. 16 31
Fed. R. Civ. P. 23 ..... 7, 19
Fed. R. Civ. P. 23(e) 6, 31, 34
Fed. R. Civ. P. 56 38
Fed. R. Civ. P. 59(e) 21
Fed. R. Civ. P. 68 20

LEGISLATIVE MATERIALS

S. Rep. No. 416, 96th Cong., 1st Sess. (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 787 .. 17
S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908 ... 9-10, 15, 16 32, 34, 38
H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) .. 9, 15, 16-17, 34

MODEL CODE AND RULES

Model Code of Professional Responsibility
EC 5-1 18
EC 7-7 ..... 18, 31
EC 7-9 18
EC 7-12 19
EC 7-14 22
DR-1-102(A)(5) 22

TABLE OF AUTHORITIES—Continued

	Page
Model Rules of Professional Conduct	
Model Rule 1.2(a)	18, 31
Model Rule 1.7(b)	18
Model Rule 1.14	19
BAR OPINIONS	
Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80-94, *reprinted in* 36 Record of New York City Bar Assoc. 507 (1981)	22
Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 82-80 (1984)	37
District of Columbia Bar Legal Ethics Committee, Op. No. 147, *reprinted in* 113 Daily Wash. Law Rep. 389 (1985)	22
Grievance Commission of Board of Overseers of the Bar of Maine, Op. No. 17 (1981)	22
State Bar of Georgia, Op. No. 39, *reprinted in* 10 Georgia State Bar News 5 (1984)	22
MISCELLANEOUS	
Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988*, 55 Colo. L. Rev. 341 (1984)	14, 31
Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal and Ethical Considerations*, 131 U. Pa. L. Rev. 793 (1983)	14
6A A. Corbin, *Contracts* (1962 & Supp. 1984)	26-27
Fee Waiver Requests Unethical: Bar Opinion, 68 A.B.A.J. 23 (1982)	25
Final Subcommittee Report of the Committee on Attorney's Fees of the Judicial Conference of the United States Court of Appeals for the District of Columbia Circuit, *reprinted in* 13 Bar Rep. 4 (1984)	23-24

TABLE OF AUTHORITIES—Continued

Page

Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Awards Act of 1976*, 29 Vill. L. Rev. 597 (1984) 14, 25-26

Restatement (Second) of Contracts (1981) 10, 27, 33

Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 Law & Contemp. Probs. 293 (1984) 14, 28, 33, 34

7A C. Wright & A. Miller, *Federal Practice and Procedure* (1972) 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1288

JOHN V. EVANS, *et al.*,
Petitioners,

v.

JEFF D., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondents, a class of over 2,000 indigent children from the State of Idaho, suffer from emotional and mental handicaps and are institutionalized or otherwise placed in petitioners' custody.[1] Due to petitioners' failure to provide appropriate mental health services, many of these children were confined in adult psychiatric wards of state hospitals, including the facilities at State Hospital South ("SHS"), or in out-of-state treatment institutions located thousands of miles from their homes and families. Joint Appendix ("J.A.") 5, 6. Most of the children suffer from conditions that could be successfully treated by appropriate mental health care in the

---

[1] Petitioners are the Governor of the State of Idaho, the Director of the Idaho Department of Health and Welfare, and two officials of the Adult State Mental Hospital, State Hospital South.

community rather than by placement in adult psychiatric institutions or out-of-state facilities. J.A. 65.

When this suit was filed the class members were not receiving the minimal educational or mental health services required by law. SHS did not have a child psychiatrist or a licensed specialist in child psychology on its staff. J.A. 72. In fact, SHS had no employees with the experience or qualifications to provide specialized treatment or services to emotionally and mentally disturbed children. J.A. 72. The clinical evidence showed that the condition of many of the children had not significantly improved or had actually regressed due to their inappropriate placement and the lack of adequate services. J.A. 68, 74.

SHS is primarily an adult psychiatric hospital with no special programs designed for juveniles. J.A. 72. The children confined at SHS were housed in facilities where physical contact with adult psychiatric patients was unavoidable. Many of these adult patients were committed by state courts for having illegal sexual conduct with children or were deemed mentally unfit to stand trial on charges of other criminal offenses. J.A. 63. As a result of these living and sleeping arrangements, some of the adult patients had inflicted bodily injuries on the children. J.A. 63-64.

On August 4, 1980, respondents filed a complaint against petitioners and the Superintendent of the Idaho State Department of Education ("Department of Education") seeking an injunction ordering the defendants to provide class members with appropriate educational and mental health services, to establish procedures for the development of community-based residential treatment programs and to prevent the future admission of children to the adult patient facilities at SHS. Respondents' claims were based upon the due process and equal protection guarantees of the Fifth and Fourteenth Amendments to the United States Constitution, and var-

ious federal and state statutory provisions protecting the rights of the handicapped. The complaint did not request damages for injuries suffered by members of the class, but it sought injunctive relief to ensure that the children would be provided the minimally adequate services required by law. J.A. 31.

The class of indigent children was represented by Idaho Legal Aid Services, Inc. ("Idaho Legal Aid"), a private, non-profit organization that provides free legal services to qualified low-income persons. As an entity receiving grants under the Legal Services Corporation Act, 42 U.S.C. §§ 2996-2996*l* (1982), Idaho Legal Aid is prohibited from representing individuals who are capable of paying their own legal fees. *See id.* § 2996f(b)(1); 45 C.F.R. § 1609 (1984). Thus, no fee agreement requiring respondents to pay for legal services could have been obtained. However, the complaint sought costs and attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).[2] *See* J.A. 31.

Settlement discussions began within three months after the action commenced, before substantial work had been done on the case. During the initial stages of negotiations respondents attempted to settle both the education and mental health services claims. By March 26, 1981, respondents had reached a basic agreement with the Department of Education on the need for appropriate educational services for the children, *see* Appendix to Brief of Petitioners ("Pet. App.") 2-3, and on October 19, 1981 the parties entered into a stipulation resolving all of the

---

[2] 42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

education-related claims. As part of its settlement proposal, the Department of Education required that respondents waive their statutory right to attorney's fees, and respondents agreed. J.A. 54.

Settlement discussions with petitioners on the mental health services claims did not proceed as smoothly. On March 26, 1981, respondents' counsel informed petitioners of significant problems with their proposed stipulation, which failed to include adequate commitments on issues of critical importance, including the establishment of individualized treatment plans prepared by a qualified mental health professional, the determination of an appropriate minimum age for admission of patients to SHS, and the segregation of patients under age twenty-one from the adult patients at SHS. Petitioners also insisted on a waiver of fees by respondents. Pet. App. 2-5. After eight months of further negotiations, counsel for both sides reached complete agreement on the medical services issues, as well as the fee waiver, but petitioners nonetheless rejected the settlement on December 18, 1981.

Respondents therefore had no alternative but to press for a judicial resolution of their claims. From December 1981 to March 1983 the litigation intensified, as respondents' counsel engaged in extensive discovery, pretrial proceedings, motions for summary judgment, and preparation for trial.[3] On July 26, 1982, the district court granted petitioners' motion for summary judgment as to some of respondents' statutory claims, but

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[3] Respondents served several sets of interrogatories, requests for production of documents, requests for admissions and written interrogatories, and took extensive depositions. Respondents also continued to press their motions for class certification and for preliminary injunctive relief. In addition, they responded to petitioners' discovery requests and motion for summary judgment, and undertook extensive trial preparations, including subpoenaing witnesses, preparing experts, outlining testimony, preparing exhibits and drafting a pretrial statement.

denied summary judgment on all other grounds, including respondents' federal constitutional claims. Contrary to petitioners' assertions, *see* Brief for Petitioners ("Pet. Br.") 9, 44, the court's order of partial summary judgment did not preclude recovery of any of the relief sought, and ultimately obtained, by respondents. *See* J.A. 31, 56. Two months after the court ruled on summary judgment, it certified the plaintiff class. J.A. 58.

In March 1983, one week before the trial was scheduled to begin, petitioners presented a new settlement proposal. This stipulation offered virtually all of the injunctive relief respondents had sought in their complaint, *Jeff D. v. Evans*, 743 F.2d 648, 649-50 (9th Cir. 1984), but demanded a complete waiver of all claims for costs and attorney's fees. J.A. 104. Respondents' counsel informed petitioners that his clients would accept the stipulation on the merits with minor additions, but strenuously objected to the paragraph demanding a waiver of attorney's fees because it unethically placed him in conflict with the interests of his clients. 743 F.2d at 650; J.A. 89.

Taking advantage of the ethical dilemma in which they had placed respondents' counsel by offering substantial relief on the merits while insisting that counsel receive no compensation, even after two and a half years of litigation, petitioners refused to withdraw the demand for a fee waiver. They did agree, however, to respondents' suggestion that the validity of the waiver be determined by the district court. The parties therefore modified the stipulation by adding the phrase "if so approved by the Court" after the fee waiver.[4]

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[4] As modified, the relevant paragraph of the stipulation read:

> 25. Plaintiffs and defendants shall each bear their own costs and attorney's fees thus far incurred, *if so approved by the Court.*

J.A. 104 (emphasis added).

The parties submitted the settlement agreement, including the fee waiver, to the district court for approval pursuant to Rule 23(e). At a hearing on March 22, 1983, the district court vacated the trial date and took the matter under submission. Two weeks later, respondents filed a Motion for Consideration of Costs and Attorney Fees on Settlement. J.A. 87. At a second hearing convened on April 28, 1983, the district court approved the stipulation, J.A. 94, and on May 6, 1983 the court denied respondents' motion for costs and attorney's fees, J.A. 106.

In considering whether to allow costs and attorney's fees, the district court did not question the strength of respondents' case, nor did it suggest that respondents had not prevailed in the action by virtue of the substantial equitable relief they received in the settlement. 743 F.2d at 650. In fact, as the court of appeals observed, petitioners themselves did "not maintain that there [was] any basis, apart from the stipulation, for the denial of attorney's fees. . . . [Their] only contention [was] that the [respondents] should be bound by the stipulation waiving fees." *Id.*

The district court denied costs and fees solely on the basis of the stipulated waiver, but in approving the waiver it focused on the wrong legal and ethical issues presented by petitioners' demand. In its view, the validity of the waiver turned entirely on whether the decision of respondents' counsel would harm his clients:

> [T]he ethical consideration is "Is the attorney in the process of bargaining out to depreciate his client's claim or to proceed in a manner that will be unfair to his client?" And I think the ethical considerations run only to [that] issue . . . .

J.A. 93. The court thus failed to recognize that by offering nearly all of the injunctive relief sought in the complaint but insisting on a fee waiver, petitioners had placed respondents' counsel in a conflict of interest with his

clients that could be resolved only by acceding to the waiver. It also failed to recognize that this tactic would enable petitioners to circumvent their statutory liability for fees and frustrate the policies Congress sought to implement by making fees available to prevailing parties under Section 1988.

Respondents appealed from the May 6 order denying costs and fees, and the Ninth Circuit reversed.[5] Although the court of appeals discussed in dictum a decision of the Third Circuit disapproving all simultaneous negotiations of merits and attorney's fees, *see Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977), it reaffirmed the view held by the Ninth Circuit that the results of such fee negotiations are not "per se unacceptable." 743 F.2d at 652. However, after considering the undisputed facts of this case, the requirements of Rule 23 and Section 1988, the public policies served by attorney's fee awards in civil rights cases, and the ethical conflict created by petitioners' demand between the class lawyer's interest in compensation and the class members' interest in relief, the court concluded that the "stipulated waiver of *all* attorneys' fees obtained *solely* as a condition for obtaining relief for the class should not be accepted by the court," *id.* (emphasis added), and remanded the case for a determination of reasonable attorney's fees.

SUMMARY OF ARGUMENT

This case presents a narrow question for decision, but one that is crucial to the enforcement of the civil rights laws: whether a court in a civil rights action, in which only injunctive relief is sought, may enforce a complete waiver of plaintiffs' right to costs and attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, where the defendant on the eve of trial

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[5] While the appeal was pending, the Ninth Circuit also ordered petitioners to abide by the terms of the stipulation and to implement the relief provided therein while appellate review was being completed. J.A. 117, 119.

has conditioned a settlement offer providing substantial relief on the merits on that waiver. Rather than addressing this fundamental issue, petitioners argue that the court of appeals should not have imposed a per se rule against "simultaneous negotiation of both merits and attorney's fees in class action settlements." Pet. Br. 7. Much of the briefing by petitioners and their amici revolves around this misconception of the case. The court of appeals, however, did not rely on a per se rule against simultaneous negotiations to support its decision. Rather, it found the fee waiver in this case contrary to the important public policies behind Section 1988, and held only that a "stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court." *Jeff D. v. Evans*, 743 F.2d at 652.

The facts of this case show that petitioners secured a fee waiver by exploiting a conflict of interest between respondents and their counsel. Respondents are a class of indigent, mentally and emotionally handicapped children who sought to obtain lawful conditions of institutionalization by petitioners. In such cases, where indigent plaintiffs seek only injunctive relief, counsel's only opportunity for compensation lies in an award of statutory attorney's fees. Despite his interest in recovering fees, the paramount obligation of respondents' counsel was, as petitioners surely were aware, to protect the interests and special needs of his clients. On the eve of trial, after two and a half years of litigation and a previous refusal to settle, petitioners offered a settlement that provided nearly all of the merits relief sought by respondents but demanded a complete waiver of costs and attorney's fees under Section 1988. Federal courts and a number of bar ethics committees have recognized that such an offer unfairly and improperly pits the lawyer's interest in fees against his client's interest in relief on the merits. Confronted with that offer, respondents' counsel could not ethically place his own interest in compensation above his

clients' need for relief. Even to delay obtaining that relief, which included the termination of such practices as housing emotionally disturbed children with adult psychiatric patients charged with crimes, was obviously unacceptable.

But for the stipulated fee waiver, respondents would have been entitled to reasonable fees and costs under Section 1988. "[A] prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,'" *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976)), and a plaintiff who obtains a favorable settlement can recover fees. *See Maher v. Gagne*, 448 U.S. 122 (1980). There is no question that respondents prevailed in this case. Their class was certified, their constitutional claims withstood summary judgment, and, on the eve of trial, they obtained a settlement granting them nearly all of the relief they sought. Only by "driv[ing] a wedge" between respondents and their counsel, Pet. Br. 37, and by playing upon counsel's professional concern for his clients' interests, were petitioners able to circumvent their liability for attorney's fees under Section 1988. By coercing a waiver of respondents' federally created rights under Section 1988, petitioners' actions contravene that statute and raise significant constitutional questions.

The impact of petitioners' tactic, if upheld, would extend far beyond the denial of fees in this case. Indeed, its effect would be to undermine the policies Congress sought to implement through Section 1988. Recognizing that most "victims of civil rights violations cannot afford legal counsel," Congress authorized fee awards to "attract competent counsel" to civil rights cases and thus enable indigent plaintiffs to "present their cases to the courts." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1, 9 (1976). Finding that "fee awards are essential" if the civil rights laws are to be "fully enforced," S. Rep. No.

1011, 94th Cong., 2d Sess., 5 (1976), Congress enacted Section 1988 to encourage private enforcement of those laws. These congressional purposes plainly would be frustrated by judicial enforcement of coerced fee waivers. If upheld, defendants will routinely demand, and obtain, fee waivers as a condition to settlement in civil rights cases. Deprived of the economic incentives intended by Congress, indigent civil rights plaintiffs seeking injunctive relief will be unable to attract competent counsel to present their claims.

The district court addressed none of the problems posed by the fee waiver in this case. It completely misapprehended the coercive nature of petitioners' demand, disregarded the impact of such a fee waiver on the purposes of Section 1988, and rubber-stamped the stipulated waiver without independently assessing, as it was required to do under Section 1988, the reasonableness of awarding no fees at all in this case. *See, e.g., Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1929 (1984).

The court of appeals correctly reversed the district court and held that the fee waiver should not be enforced. The court plainly had authority to invalidate a provision of an agreement that is contrary to public policy, *see, e.g., McBrearty v. United States Taxpayers Union*, 668 F.2d 450 (8th Cir. 1982) (per curiam); *Restatement (Second) of Contracts* § 178 (1981), and its decision was consistent with the rulings of other courts that have set aside fee waivers as contrary to the public policy embodied in Section 1988. *E.g., Shadis v. Beal*, 685 F.2d 824 (3rd Cir.), *cert. denied*, 459 U.S. 970 (1982); *Gillespie v. Brewer*, 602 F. Supp. 218, 226-28 (N.D. W. Va. 1985).

Contrary to petitioners' contention, the court of appeals also correctly declined to invalidate the entire settlement agreement. Courts have modified fee provisions

and invalidated fee waivers without disturbing the rest of the settlement agreements of which they were a part. *See, e.g., Jones v. Amalgamated Warbasse*; *Shadis v. Beal*. Moreover, the parties here recognized the questionable validity of the fee waiver and explicitly reserved the issue for the court to decide. Finally, if it was improper for petitioners to insist upon a fee waiver as a settlement condition, it would make little sense to allow them to avoid all of their obligations under the agreement on the ground that they relied on the impermissible waiver.

Petitioners and their amici suggest various alternatives to address the problems posed by coerced fee waivers, but none would be as fair and effective as the approach taken by the court of appeals. For example, they suggest that the problems posed by the type of fee waiver demanded here could be avoided by a carefully crafted retainer agreement. But even if a retainer agreement explicitly authorized respondents' counsel to decline a settlement offer that was clearly in the best interests of the handicapped children he represented, it would hardly resolve the dilemma he faced as a conscientious attorney, and it would probably be invalid.

Finally, affirming the court of appeals decision would not interfere with the legitimate interests of defendants in settling civil rights cases. Defendants could still obtain information about fees from plaintiffs, and thus assess their total potential liability. Nor would such a ruling preclude negotiation and settlement of attorney's fees. Rather, it would merely eliminate a tactic that enables defendants, contrary to Congress' intent, to avoid any liability for fees in settling meritorious civil rights suits. If the coerced fee waiver in this case is upheld, the harm will be not only to respondents here, but also to future indigent victims of civil rights violations, whose claims will go unredressed because they will be unable to secure counsel to represent them.

ARGUMENT

I. THIS CASE CONCERNS COERCIVE REQUESTS FOR FEE WAIVERS IN CIVIL RIGHTS CASES, NOT A PER SE RULE BARRING SIMULTANEOUS NEGOTIATION OF THE MERITS AND ATTORNEY'S FEES.

At the outset it is important to clarify the issues at stake. This case presents a narrow question for decision: Whether a court, in a civil rights action involving only injunctive relief, may enforce a complete waiver of costs and attorney's fees, where the defendant after two and a half years of litigation has conditioned a settlement offer providing nearly all of the relief sought by the plaintiffs on that waiver. Petitioners and their amici never come to grips with this fundamental issue. Instead, conceding that in some circumstances fee waivers are improper, *see, e.g.*, Pet. Br. 36, they contend that this Court should not impose a complete ban on "simultaneous negotiation of both merits and attorney's fees in class action settlements." *See, e.g.*, Pet. Br. 7; Brief for the United States As Amicus Curiae Supporting Reversal ("U.S. Br.") 5. That issue is simply not presented by the record or the ruling below.

Petitioners contend that the court of appeals "impos[ed] . . . a *per se* bifurcated settlement rule" and "ruled that . . . all negotiated settlements, absent unusual circumstances, must be conducted in two separate stages." Pet. Br. 10. But the Ninth Circuit made no such sweeping pronouncement. Rather, it held that the fee waiver in this case contravened the public policy reflected in Section 1988 and that the district court should not have denied attorney's fees on the basis of that waiver. The court of appeals clearly stated its precise holding:

> [A] stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class

> should not be accepted by the court. Rather, the court should make its own determination of the fees that are reasonable, giving due consideration to the appropriate factors.

Jeff D. v. Evans, 743 F.2d at 652.

That ruling is unassailable in the factual context of this case. On the merits, respondents presented substantial constitutional claims concerning the state's treatment of mentally and emotionally handicapped children. These claims withstood petitioners' motion for summary judgment. The case was certified as a class action, and the settlement offered by petitioners on the eve of trial provided nearly all of the merits relief sought by the plaintiff class. Thus, the concerns of several amici about not being able to settle "nuisance" suits do not pertain to this case. *See* p. 37 *infra*.

In addition, respondents sought and received only injunctive relief. Such cases leave plaintiff's counsel with no possibility of compensation other than an award of fees under Section 1988. This case thus does not present the validity of a "lump sum" settlement or a "sweetheart" settlement that offers high fees to tempt plaintiff's counsel to accept a lower settlement on the merits.[6] Petitioners' settlement offer, accompanied by a demand for a complete fee waiver, squarely pitted counsel's interest in compensation for his efforts against the interest of the plaintiff class in an extremely beneficial settlement. As the court of appeals recognized, the ability of defendants to exploit such a conflict in order to exact fee waivers from plaintiffs' counsel undermines the economic incentives that Congress expressly provided in Section

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[6] The interests of plaintiffs and their counsel are not as divergent where the parties negotiate a settlement providing monetary damages or a common fund. The higher the settlement amount, the higher the fees counsel might obtain from the fund. Similarly, in a standard contingent fee contract, counsel's fee is a percentage of the monetary relief the plaintiff receives.

1988 to encourage private enforcement of the civil rights laws.

Finally, this case does not involve a surprise challenge by plaintiffs to a fee waiver they had misleadingly accepted. Respondents' counsel made it clear that he believed the fee waiver was unlawful and unethical, and the parties consequently made the waiver expressly subject to court approval. *See* p. 5 & n.4 *supra*.[7]

To be sure, there are other important issues concerning the settlement of cases in which statutory attorney's fees are recoverable. Commentators have offered a variety of possible solutions to the full range of issues that might arise in such cases.[8] But this case presents only the stark issue of the validity of a fee waiver, in a case involving injunctive relief only, exacted from plaintiffs' counsel on the eve of trial as a condition to a settlement offer on the merits that was extremely favorable to his clients. For the reasons set forth below, respondents maintain that the judgment of the court of appeals invalidating that fee waiver should be affirmed.

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[7] Petitioners' suggestion, *see* Pet. Br. 47-48, that there may be "special circumstances" for denying fees on the ground that the challenge to the waiver by respondents' counsel unfairly surprised or misled them is thus unfounded.

[8] *See, e.g.*, Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988*, 55 Colo. L. Rev. 341 (1984) (fee awards under Section 1988 should be non-negotiable); Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Awards Act of 1976*, 29 Vill. L. Rev. 597 (1984) (endorsing ban on simultaneous negotiation of merits and attorney's fees); Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 Law & Contemp. Probs. 293, 316-19 (1984) (endorsing post-settlement invalidation of fee waivers as contrary to public policy); Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U. Pa. L. Rev. 793 (1983) (endorsing discontinuance of simultaneous negotiations only upon request of plaintiff's counsel).

II. IN ENACTING SECTION 1988, CONGRESS DETERMINED THAT AWARDS OF ATTORNEY'S FEES WERE ESSENTIAL TO PRIVATE ENFORCEMENT OF CIVIL RIGHTS LAWS.

The legislative history of Section 1988 makes its purpose plain: the statute was intended to facilitate private enforcement of civil rights laws by enabling prevailing plaintiffs to recover costs and attorney's fees. The Act was passed in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that federal courts could not award attorney's fees to a prevailing party absent explicit congressional authorization. Testimony before Congress "indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976) ("House Report"). The House Report stated that civil rights "plaintiffs were the hardest hit by the decision," and specifically noted that "private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." *Id.* at 3. Section 1988 was intended to remedy this problem.[9]

The legislative history emphasized Congress' finding that, if civil rights plaintiffs could not recover attorney's fees, they would go unrepresented and civil rights violations would go unredressed. The House Judiciary Com-

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[9] Emphasizing that Section 1988 was intended to achieve uniformity in federal civil rights laws, petitioners suggest that this goal was an implicit endorsement of fee waivers because such waivers were permissible under existing fee provisions in other civil rights statutes. *See* Pet. Br. 13-14. The cases cited by petitioners do not show that fee waivers were permissible. *See* p. 26 n.25 *infra*. In any event, the uniformity sought by Congress concerned the effect of this Court's decision in *Alyeska*, which "created anomalous gaps in our civil rights laws whereby awards of fees [were] . . . suddenly unavailable" in actions under those civil rights statutes that lacked a fee provision. S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976).

mittee found that "a vast majority of the victims of civil rights violations cannot afford legal counsel" and are therefore "unable to present their cases to the courts." House Report, at 1. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) ("Senate Report") (many civil rights plaintiffs "who must sue to enforce the law ha[ve] little or no money with which to hire a lawyer"). By authorizing recovery of attorney's fees, Section 1988 gave "such persons effective access to the judicial process where their grievances can be resolved . . . ." House Report, at 1.

Congress found the need for recovery of attorney's fees "pressing" and "compelling." *See* House Report, at 3. The Senate Judiciary Committee stressed that the "civil rights laws depend heavily upon private enforcement," Senate Report, at 2, and that "fee awards are essential" if the civil rights laws "are to be fully enforced." *Id.* at 5. *See id.* at 2 ("fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies" in the civil rights laws). Congress also viewed fee awards as a critical deterrent to civil rights violations. The Senate Judiciary Committee stressed that fee awards are necessary "if those who violate the Nation's fundamental laws are not to proceed with impunity . . . ." Senate Report, at 2. *See id.* at 5 ("fee awards are an integral part of the remedies necessary to obtain . . . compliance" with civil rights laws).[10]

Congress specifically focused on civil rights cases in which damages might be unavailable, noting that

> awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if

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[10] Congress also recognized that the less desirable alternative to vigorous private enforcement of the civil rights laws was increased enforcement by the government. *See id.* at 4 ("fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy").

> Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by [the bill], only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.

House Report, at 9. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam); *Cooper v. Singer*, 719 F.2d 1496, 1502 (10th Cir. 1983).

This case epitomizes Congress' concerns. A class of emotionally and mentally handicapped children obviously does not have the funds to hire private lawyers and finance this type of litigation.[11] Only with legal representation provided without fee by Idaho Legal Aid were respondents able to prosecute successfully their injunctive claims and secure conditions and services required by law. Respondents' counsel had every reason to believe they would be able to recover costs and fees if they prevailed at trial or through settlement.[12] Instead, petitioners compelled respondents' lawyers to forego compensation as part of a settlement offer providing nearly all of the merits relief the class sought. If one of the results

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[11] In enacting the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997-1997j (1982), Congress recognized that institutionalized persons are in dire need of legal representation to protect their basic civil rights:

> Most institutionalized persons are poor; many are indigent; none possesses the resources necessary to finance litigation challenging systematic, institution-wide abuse. The cost of hiring experts to investigate, document, evaluate, and present testimony on the adequacy of institutional conditions is beyond the means of the most affluent institutionalized individuals.

S. Rep. No. 416, 96th Cong., 1st Sess. 20 (1979).

[12] Congress made it clear that legal services organizations could recover fees under Section 1988. *See* House Report, at 8 n.16; *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70-71 n.9 (1980); *Leeds v. Watson*, 630 F.2d 674, 677 (9th Cir. 1980).

of successfully settling civil rights cases is a waiver of costs and fees, the financial ability of Idaho Legal Aid, or indeed any attorney, to represent future civil rights claimants will be seriously undermined.

III. PETITIONERS WERE ABLE TO EXACT A FEE WAIVER BY IMPROPERLY CREATING AND EXPLOITING A CONFLICT OF INTEREST BETWEEN RESPONDENTS AND THEIR COUNSEL.

The serious threat to the purposes of Section 1988 derives from the unique ability of defendants in petitioners' position to exploit a conflict of interest between plaintiffs and their counsel. Under the American Bar Association's Model Code of Professional Responsibility ("Model Code"),[13] a lawyer has a fiduciary obligation to protect the interests of the client. The lawyer's undivided loyalty to his client cannot be diluted by his "personal interests," and his professional judgment must be exercised "solely for the benefit of his client and free of compromising influences and loyalties." EC 5-1; *see* Model Rule 1.7(b). Accordingly, an attorney is required to evaluate a settlement offer purely on the basis of his client's interest, without considering his own interest in obtaining a fee. *See* EC 7-7 ("it is for the client to decide whether he will accept a settlement offer"); Model Rule 1.2(a) ("lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter"). The attorney's entitlement to seek fees under Section 1988 does not lessen his duty "always to act in a manner consistent with the best interests of his client," EC 7-9, and to provide disinterested counsel to his client. A favorable settlement offer coupled with a fee waiver de-

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[13] The State of Idaho has adopted standards of professional ethics very similar to the Model Code, which was adopted by the American Bar Association in 1969. In August 1983 the American Bar Association adopted the Model Rules of Professional Conduct. The Model Rules and the Model Code equally support the reasoning set forth herein.

mand thus directly pits the attorney's economic interests against the client's interests.[14]

The "cruel dilemma" faced by an attorney confronted with such a settlement offer conditioned on a fee waiver, *Freeman v. B & B Associates*, 595 F. Supp. 1338, 1342 (D.D.C. 1984), *appeal docketed*, No. 85-5239 (D.C. Cir. Mar. 11, 1985), is particularly acute in the circumstances of this case. On the one hand, the lawyer's interest in recovering fees under the statute is at its height. As is often true in civil rights cases, respondents' counsel had no expectation of being paid by the indigent children he represented. Moreover, as in any case involving equitable relief only, the relief obtained cannot provide any compensation for the attorney.

On the other hand, the attorney here has special obligations to protect his client's interests. Counsel is obligated under Fed. R. Civ. P. 23 to represent adequately the interests of the absent class members as well as the named plaintiffs. Representing a class of mentally and emotionally handicapped children "casts additional responsibilities upon [the] lawyer" to "act with care to safeguard and advance the interests of his client." EC 7-12; *see* Model Rule 1.14. These ethical obligations precluded respondents' counsel from rejecting petitioners' settlement offer, which provided immediate relief for children in need. Respondents' interest in promptly ending such practices as placing emotionally disturbed children with adult sex offenders properly dictated his decision. Petitioners surely knew that respondents' counsel could not ethically turn down their settlement offer in

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[14] The Legal Services Corporation Act specifically provides that legal services attorneys "must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. § 2996(6).

order to protect his fees, and they placed him in that position solely to avoid their liability under Section 1988.[15]

Courts have widely recognized the ethical problems inherent in settlement offers conditioned on fee waivers. Justice Powell pointed out the conflict of interest inherent in an offer of judgment under Rule 68 that does not include costs and attorney's fees:

> An offer to allow judgment that does not cover accrued costs and attorney's fees is unlikely to lead to settlement. Many plaintiffs simply could not afford to accept such an offer. It may be, also, that the plaintiff's lawyer instituted the suit with no hope of compensation beyond recovery of a fee from the defendant. Such a lawyer might have a conflict of interest that would inhibit encouraging his client to accept an otherwise fair offer.

Delta Air Lines, Inc. v. August, 450 U.S. 346, 364 (1981) (Powell, J., concurring).[16] Other courts have recognized the same problem in demands for waivers of fees under Section 1988.[17]

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[15] Petitioners contend that it would be "anomal[ous]" to bar a waiver of the right to attorney's fees under Section 1988 since constitutional rights of defendants in criminal cases can be waived. *See* Pet. Br. 14 n.3. This argument completely ignores the coercive nature of the fee waiver demanded here. Cases are legion in which this Court has emphasized that a waiver of constitutional rights must be "voluntary" as well as "knowing and intelligent," *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (right to counsel), and not "coerce[d]" or "compelled." *Lefkowitz v. Turley*, 414 U.S. 70, 79-83 (1973) (privilege against self-incrimination).

[16] *See Freeman v. B & B Assoc.*, 595 F. Supp. 1338, 1342 (D.D.C. 1984) (offer of judgment conditioned on fee waiver allows defendant "to squeeze an attorney and his client into a situation where an attorney can only be assured of an opportunity for a fee by jeopardizing a settlement otherwise advantageous to his client"), *appeal docketed*, No. 85-5239 (D.C. Cir. Mar. 11, 1985).

[17] *See, e.g., Moore v. National Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1100, 1103 (D.C. Cir. 1985) (petition for rehearing held in abeyance pending outcome of this case); *Lazar v. Pierce*,

Petitioners and their amici suggest that *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), supports their position. In *White*, the Court held that a post-judgment fee motion was not a motion under Fed. R. Civ. P. 59(e) to alter or amend a judgment on the merits. That the Court "decline[d] to rely on" an alternative argument that negotiation of attorney's fees should be deferred until after judgment on the merits hardly supports petitioners' contention that conditioning a settlement offer on a waiver of fees is permissible. Indeed, the Court acknowledged that simultaneous negotiation of fees and merits "may raise difficult ethical issues for a plaintiff's attorney." 455 U.S. at 454 n.15.[18]

A number of bar ethics committees have also acknowledged the ethical problems presented by fee waiver demands. The Ethics Committee of the New York City Bar Association has recognized that, because of his ethi-

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757 F.2d 435, 438 (1st Cir. 1985); *Obin v. District No. 9 Int'l Ass'n of Machinists*, 651 F.2d 574, 582-83 (8th Cir. 1981); *Gillespie v. Brewer*, 602 F. Supp. 218, 226-28 (N.D. W. Va. 1985); *Regalado v. Johnson*, 79 F.R.D. 447, 451 (D. Ill. 1978).

The State Amici make much of the fact that Section 1988 authorizes an award of fees to a prevailing party, and not directly to counsel, suggesting that any conflict of interest between attorney and plaintiff over recovery of fees was not objectionable to Congress. *See* Brief of Alabama, et al., Amici Curiae In Support of Petitioners ("States Br.") 19-22. But Congress made it clear that fee awards were intended "to attract competent counsel" to civil rights cases, House Report, at 9, and courts have recognized that "a motion for fees and costs in such a case, although made in the name of the plaintiff, is really one by the attorney." *Regalado v. Johnson*, 79 F.R.D. 447, 451 (D. Ill. 1978); *see James v. Home Constr. Co. of Mobile*, 689 F.2d 1357, 1358 (11th Cir. 1982).

[18] Petitioners' reliance on a statement in *White* that "a defendant may have good reason to demand to know his total liability from both damages and fees," 455 U.S. at 454 n.15, is misplaced since petitioners here did not seek any information on liability for fees but insisted upon a complete fee waiver. *See* p. 37 *infra*.

cal obligations to the client, plaintiff's counsel "must ignore his or his organization's interest in a fee and recommend waiver of the fee, if the substantive terms of the settlement are desirable for the plaintiff." Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80-94 at 4, *reprinted in* 36 Record of New York City Bar Assoc. 507 (1981).

> Defense counsel thus are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: they make a demand for a benefit which the plaintiff's lawyer cannot resist as a matter of ethics and which the plaintiff will not resist due to lack of interest.

Id. Noting that statutory fees are "critical to the administration of justice," *see* DR-102(A)(5), the Committee concluded that "it is unethical for defense counsel to exploit this situation in cases arising under statutes aimed at protecting civil rights and civil liberties." *Id.*[19] The District of Columbia Bar adopted the same analysis. District of Columbia Bar Legal Ethics Committee, Op. No. 147, *reprinted in* 113 Daily Wash. Law Rep. 389 (1985); *see also* Grievance Commission of Board of Overseers of the Bar of Maine, Op. No. 17 (1981) (unethical to negotiate fees prior to settlement of the underlying action where statutory fees are available).[20]

The district court here utterly failed to comprehend the conflict of interest created by petitioners' settlement offer conditioned on a fee waiver. The court stated that "the

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[19] The Committee also noted the special obligation of government attorneys under EC 7-14 not to use their position or the power of the government "to bring about unjust settlements or results."

[20] State Bar of Georgia, Op. No. 39, *reprinted in* 10 Georgia State Bar News 5 (1984) (see Pet. Br. 18), merely authorizes lump sum settlement offers, without considering fee waivers in injunctive relief cases.

ethical considerations run only to the issue" of whether "the attorney in the process of bargaining [is] out to depreciate his client's claim or to proceed in a manner that will be unfair to his client." J.A. 93. Presumably, the district court would have recognized the conflict if respondents' counsel had refused the settlement offer by placing his own interest in obtaining a fee above the interests of his clients. The conflict created by petitioners did not disappear simply because counsel recognized his ethical duty and accepted the offer.

Petitioners ultimately do not dispute that their conduct created a serious conflict of interest for respondents' counsel. They merely contend that, "in light of these alleged conflict of interest problems," "a *per se* bifurcated settlement rule is not appropriate." Pet. Br. 11, 20; *see also* U.S. Br. 22 (conditional settlement offers are "not ipso facto indicative of bad faith or unethical conduct"). Whether or not a *per se* rule is appropriate, on the facts of this case it was improper for petitioners to use their conditional settlement offer to "drive[] a wedge between [the] plaintiffs and plaintiff's counsel," Pet. Br. 37, and exploit that conflict of interest to evade their statutory liability for fees.[21]

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[21] Petitioners rely on the Final Subcommittee Report of the Committee on Attorney's Fees of the Judicial Conference of the United States Court of Appeals for the District of Columbia Circuit, *reprinted in* 13 Bar Rep. 4 (1984), but that report simply declined to adopt a flat rule prohibiting simultaneous settlement of the merits and attorney's fees. Moreover, the Report offered two examples suggesting that the fee waiver in this case would be considered improper. First, the Committee indicated that a lump sum settlement offer would be proper in a Title VII case "in which the only issue is money, and the defendant believes that the plaintiff's case is very weak." *Id.* at 6. By contrast, in a Freedom of Information Act case, it would be improper for government counsel to condition release of the requested documents upon a waiver of attorney's fees. "That situation presents a grossly unfair choice to the plaintiff and his/her counsel, and permitting such offers to be made would seriously undermine the purpose of fee shifting provi-

IV. THE COURT OF APPEALS PROPERLY INVALIDATED THE FEE WAIVER AS CONTRARY TO SECTION 1988 AND THE PUBLIC POLICIES IT EMBODIES.

A. The Fee Waiver In This Case Contravened Section 1988 And Its Underlying Purposes, And The Court Of Appeals Correctly Invalidated It.

By offering to provide nearly all of the relief sought by respondents, but conditioning the offer on a complete waiver of attorney's fees, petitioners placed respondents' counsel in a conflict of interest that could only be resolved by acceptance of the settlement and the fee waiver. On the facts of record there is no doubt that, but for that waiver, respondents would have been entitled to an award of some fees under the statute. *See* pp. 34-35 *infra*. Thus, petitioners' conditional settlement offer enabled them to circumvent entirely their potential liability for fees and effectively negated the operation of Section 1988 in this case.[22]

The effect of the tactic used by petitioners, however, extends far beyond the confines of this case. In any civil rights case in which indigent plaintiffs seek injunctive relief only, a defendant can evade liability for at-

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sions." *Id.* In light of these examples, it seems highly unlikely that the D.C. Circuit Committee would approve of government counsel's conditioning a settlement providing the equitable relief requested by respondents here on a waiver of fees.

[22] Where Congress has guaranteed citizens a federal right, states may not interfere with the individual exercise of that right. *See Johnson v. Avery*, 393 U.S. 483 (1969); *see also Bounds v. Smith*, 430 U.S. 817, 834 (1977) (Burger, C.J., dissenting). Plainly, the state could not pass a statute precluding payment of attorney's fees in certain types of civil rights cases to which Section 1988 applies. Yet, petitioners and their amici suggest that they may be obliged routinely to demand fee waivers in an effort to reduce their total liability. *See* Pet. Br. 31-32; States Br. 53. Petitioners should not be permitted to "accomplish indirectly . . . that which cannot be done directly." *Williams v. Illinois*, 399 U.S. 235, 243 (1970).

torney's fees under Section 1988, even after years of litigation and no matter how strong the plaintiff's case, by offering subtantial relief on the merits coupled with a fee waiver demand. Because this tactic plays on counsel's concerns for the interests of his clients, it is especially effective where, as in this case, plaintiffs are institutionalized children who are in serious need of the relief they seek. Such coerced fee waivers plainly contravene Congress' purposes in enacting Section 1988. As the First Circuit has aptly stated:

> [F]or a defendant to require [plaintiff's counsel] to forgo his fee (the instant case being a classic example, since the so-called settlement provided no available funds, and, by hypothesis, the client was indigent) or to attempt to negotiate an unreasonable fee, by playing upon counsel's concern for his client, is contrary to the very intendment of the Act.
>
> . . . If counsel can forsee themselves subject to being euchred out of their fee, even though successful, the Congressional purpose will, pro tanto, be frustrated.

Lazar v. Pierce, 757 F.2d 435, 438 (1st Cir. 1985).[23]

Demands for fee waivers in civil rights cases are already commonplace.[24] Petitioners and their amici go so far as to suggest that defense counsel may be ethically obliged to demand such a waiver. *See* Pet. Br. 32; States Br. 51-53. If this Court endorses the practice, fee waivers will always be demanded by defendants as a settlement condition in civil rights cases. "No matter how sophisti-

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[23] The court in *Lazar* declined to allow plaintiff's counsel to recover fees, not because it approved of the fee waiver, but because plaintiff's counsel, unlike respondents' counsel here, entered the consent decree without informing the opposing parties of his intention to challenge the fee waiver provision. 757 F.2d at 437, 439. *See* p. 29 n.29 *infra*.

[24] The national staff counsel for the ACLU has estimated that requests for fee waivers are made in more than half of all civil rights cases litigated. *Fee Waiver Requests Unethical: Bar Opinion*, 68 A.B.A.J. 23 (1982).

cated the analysis of attorney responses becomes, the conclusion remains that the more we decrease the reasonable expectation of Fees Act awards, the less likely it is that Fees Act cases will be initiated." Kraus, *supra*, 29 Vill. L. Rev. at 637. Congress' goal of encouraging private enforcement of the civil rights laws by providing for recovery of fees and costs under Section 1988 clearly would be undermined by sanctioning the fee waiver at issue here.[25]

In these circumstances, there can be no doubt that the court of appeals was correct in concluding that the "waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted . . . ." *Jeff D. v. Evans*, 743 F.2d at 652. Nor is there any question that the court had authority to set aside the coerced fee waiver as contrary to the public policy embodied in Section 1988. It is well-established that federal courts may void contractual provisions that contravene public policy. *E.g.*, *McBrearty v. United States Taxpayers Union*, 668 F.2d 450 (8th Cir. 1982) (per curiam); *see generally* 6A A. Corbin, *Contracts*

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[25] Searching for some indication that such fee waivers are permissible, petitioners argue that when Congress passed Section 1988, it "must be presumed to have known" about two district court cases supposedly "interpret[ing] Titles II and VII to allow plaintiffs to waive attorney's fees," Pet. Br. 13, and that Congress implicitly endorsed those decisions by its silence on this issue. Apart from the strained logic of this proposition, the decisions cited by petitioners did *not* authorize a fee waiver. In one case, a settlement agreement specifically reserved the question of attorney's fees for resolution by the court. Unable to determine from the settlement agreement whether plaintiffs were in fact "prevailing parties," the court asked the parties to address this issue. *See Clanton v. Allied Chem. Corp.*, 409 F. Supp. 282, 284-85 (E.D. Va. 1976). In the other case, the court affirmed one award of attorney's fees under a settlement agreement and declined to award fees to another attorney because it determined that he was not entitled to them under the statute. *Leisner v. New York Tel. Co.*, 398 F. Supp. 1140 (S.D.N.Y. 1974).

§ 1375 (1962 & Supp. 1984). The *Restatement (Second) of Contracts* § 178 (1981) specifically provides that:

> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

In determining whether a provision of an agreement contravenes public policy, Section 178 looks to "the strength of that policy as manifested by legislation or judicial decisions" and "the likelihood that refusal to enforce the term will further that policy." *Id.* § 178(3)(a), (b).[26]

Relying on the Restatement, the Third Circuit in *Shadis v. Beal*, 685 F.2d 824 (3rd Cir.), *cert. denied*, 459 U.S. 970 (1982), invalidated as contrary to public policy a contract provision in which a legal services organization waived any right to request or receive legal fees in actions against the Commonwealth of Pennsylvania. The court stated that "Congress expressed unambiguously the significance it attached to the attorneys' fees provisions, and we conclude that the public policy embodied in § 1988 is a vital one." *Id.* at 831.[27] The court held the offending provision void, finding that "[i]f the Commonwealth could insert and enforce the no fees restraints in its contracts, the policy of economic

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[26] Section 178 also requires consideration of "the seriousness of any misconduct involved and the extent to which it was deliberate" and "the directness of the connection between that misconduct and the term." *Id.* § 178(3)(c), (d).

[27] The Restatement does not require an express prohibition of the contract term; rather, "it is sufficient if the legislature makes an adequate declaration of public policy which is inconsistent with the contract's terms." *Shadis*, 685 F.2d at 833-34 (citing *Restatement (Second) of Contracts* § 179, Comment (b) ("[a] court . . . will look to the purpose and history of the statute")).

inducement sought by Congress would be severely impaired." *Id.*

Courts in a variety of circumstances have refused to give effect to a waiver of a plaintiff's right to recover fees. They have specifically held fee waivers demanded as a settlement condition unenforceable as contrary to the principles of Section 1988, just as the Ninth Circuit held in this case. *Gillespie v. Brewer*, 602 F. Supp. 218, 226-28 (N.D. W. Va. 1985); *see Lisa F. v. Snider*, 561 F. Supp. 724 (N.D. Ind. 1983) (court ordered parties to conduct settlement negotiations on the merits and fees separately where defendant had demanded fee waiver as a settlement condition); *cf. Mitchell v. Johnston*, 701 F.2d 337, 351 (5th Cir. 1983) (court may not condition *pro hac vice* admission of plaintiff attorneys on waiver of their right to seek fees under Section 1988). *See* Wolfram, *supra*, 47 Law & Contemp. Probs. at 317-18 (1984).[28]

In other contexts, courts have refused to find that plaintiffs' attorneys had waived their right to seek attorney's fees under the statute. For example, a settlement agreement that is silent on attorney's fees has not been viewed as an implicit waiver barring recovery of fees. *See, e.g., El Club Del Barrio, Inc. v. United Community Corps.*, 735 F.2d 98 (3d Cir. 1984). Similarly, the existence of a contingent fee agreement between counsel and plaintiffs has not been considered a waiver of the right to recover fees under Section 1988 in excess of the contingency amount. *See, e.g., Cooper v. Singer*, 719

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[28] Courts have also protected the purposes of fee-shifting provisions in other statutes. *See, e.g., James v. Home Constr. Co. of Mobile*, 689 F.2d 1357, 1359 (11th Cir. 1982) ("Congress could not have intended" to allow settling defendants to demand fee waivers under Truth in Lending Act since "[s]uch a result would enable [defendants] . . . to escape liability for attorney's fees . . . [and] would thwart both the statute's private enforcement scheme and its remedial objectives").

F.2d 1496 (10th Cir. 1983); *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir. 1982).

In short, most courts confronting fee waivers have been true to the purposes of Section 1988. "Recognizing Congress' clear signals to apply the Act 'broadly to achieve its remedial purpose,'" *Gates v. Collier*, 616 F.2d 1268, 1275 (5th Cir. 1980) (quoting *Mid-Hudson Legal Services, Inc. v. G&U, Inc.*, 578 F.2d 34, 37 (2d Cir. 1978)), they have not permitted fee waivers to undermine Congress' intent to provide the necessary economic incentives for lawyers to represent indigent civil rights plaintiffs.[29]

Disregarding this precedent and the especially coercive nature of the fee waiver at issue here, the district court simply enforced the waiver without even considering whether it would contravene the purposes of Section 1988.[30] The district court also erred by failing to make

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[29] Petitioners' reliance on *Moore v. National Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093 (D.C. Cir. 1985) (petition for rehearing held in abeyance pending outcome of this case), is misplaced. The court in *Moore*, which specifically found this case distinguishable, 762 F.2d at 1102, held only that "plaintiffs may, voluntarily and on their own initiative, offer a waiver or concession of possible claims for fees and costs in an effort to encourage settlement." *Id.* at 1105. The court stressed this limitation on its ruling, *see id.* at 1105 n.17, 1110, as did Judge Wald's concurring opinion. *Id.* at 1112-13. It is clear in this case that respondents' counsel did not voluntarily and on his own initiative offer a fee waiver. The court in *Moore* also noted that the plaintiff "understood she had a weak case on the merits." *Id.* at 1107. Moreover, as in *Lazar v. Pierce*, 757 F.2d 435, 439 (1st Cir. 1985), a critical aspect of the decision in *Moore* was the failure of plaintiff's counsel to inform the defendants or the court of his objections to the fee waiver. *See* 762 F.2d at 1111 (Wald, J., concurring) (stressing that plaintiff's counsel "unequivocally" informed the district court "that the waiver was fully voluntary").

[30] Petitioners' contention that the district court did not deny fees solely on the basis of the waiver provision in the settlement agreement is defied not only by the district court's decision, J.A. 93-94, but by petitioners' failure even to argue in the district court

any independent determination under Section 1988 of the reasonableness of denying all fees in this case.[31] In view of these legal errors and the plain threat to the statute, the court of appeals correctly reversed the district court's decision to enforce the fee waiver.[32]

B. Petitioners' Alternatives To The Approach Of The Court Of Appeals Would Not Resolve The Problems Posed By The Coerced Fee Waiver.

Petitioners and their amici argue that there are a number of alternative solutions short of invalidating coerced fee waivers that would deal with the problems presented here. They suggest, for example, that the problems posed by a fee waiver demanded as a settlement condition should simply be worked out between plaintiffs and their counsel through a carefully crafted retainer agree-

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that respondents' motion for fees could be denied on any other basis. *See* p. 6 *supra*.

[31] *See, e.g., Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2d Cir. 1983) ("[t]he presence of an arms' length negotiated agreement among the parties weighs strongly in favor of approval, but such an agreement is not binding on the court"), *cert. denied*, 104 S. Ct. 1929 (1984); *Gillespie v. Brewer*, 602 F. Supp. 218, 226 (N.D.W.Va. 1985) (despite fee waiver clause in settlement agreement, court made its own determination that fees should be awarded and held that the "clause violates public policy and is unenforceable"); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 628 (N.D. Cal. 1979) ("[t]his Court has made it abundantly clear that it alone has the authority to determine whether and how much attorneys' fees will be awarded in this case, and that it will not be bound by any agreements between the parties regarding fees"); *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 687 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978) (per curiam); *cf. Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) (in determining reasonable fees under Section 1988, courts are not bound by contingent fee agreement).

[32] Since the district court's decision on the validity of the fee waiver was based on legal errors, petitioners' contention that the court of appeals erred by reversing without finding that the district court abused its discretion is mistaken.

ment. *See, e.g.*, Pet. Br. 33-34; U.S. Br. 7, 25. The dilemma faced by a conscientious plaintiff's attorney confronted with a very favorable settlement offer conditioned on a fee waiver would not be resolved by the existence of a retainer agreement authorizing the attorney to act against the interests of his client. Moreover, such a retainer agreement would be of questionable validity at best,[33] particularly when the clients are mentally and emotionally handicapped minors.

Petitioners also suggest that a district court can use its authority under Rule 23(e) and Rule 16 to intercede in settlement negotiations in which there are allegations of unethical conduct by defendants.[34] But requiring plaintiff's counsel to go to the judge during the negotiations is almost certain to be ineffective. If plaintiff's counsel cannot risk losing a favorable settlement by refusing to acceed to a demanded fee waiver, he will also be unable to risk withdrawal of the settlement offer by seeking the court's intervention. It is not clear what relief a district court could provide that would assist plaintiff's counsel without harming the interests of his clients that he seeks to protect.[35]

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[33] As one commentator has noted: "Any retainer provision which may be construed as a limitation on the ability of the client to settle is likely to be declared invalid. An attorney cannot insist, for example, on a right to participate equally with the client in determining the propriety of settlement." *Calhoun, supra*, 55 Colo. L. Rev. at 354. *See* EC 7-7; Model Rule 1.2(a). Further, "a contingent fee agreement cannot bind members of a class represented by an individual plaintiff and, therefore, is not an effective solution for class action." 55 Colo. L. Rev. at 356.

[34] Specifically, they suggest that the court use a magistrate or a special master or "appoint a guardian *ad litem* to protect the interests of plaintiffs." Pet. Br. 37.

[35] Moreover, in reviewing a settlement of a class action under Rule 23(e), the district court's obligation is primarily "to protect the nonparty members of the class from unjust or unfair settlements affecting their rights," 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1797, at 226 (1972), not to protect the interests of plaintiff's counsel.

Finally, petitioners urge this Court to create a presumption that defense counsel has acted in good faith, which plaintiffs would have to overcome in order for the district court to invalidate a fee waiver. Pet. Br. 36. Similarly, the Acting Solicitor General suggests that plaintiffs must meet a threshold burden of demonstrating the "bad faith" of defense counsel. U.S. Br. 27. But the defendant's good or bad faith is not the concern. Petitioner's demand for a fee waiver as a condition of a favorable settlement offer here is improper because it undermines Section 1988. This holds true even if a defendant's motivation is simply to save money by avoiding paying fees.[36] Moreover, Congress did not intend fee awards against state defendants to depend on a showing of bad faith, *see* Senate Report, at 5 n.7; *Hutto v. Finney*, 437 U.S. 678, 693 (1978), and it would be inconsistent with that intent and highly inefficient to require the court to hold a hearing on petitioners' state of mind in determining whether fees are available. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("[a] request for attorney's fees should not result in a second major litigation").[37]

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[36] The technique of exploiting a conflict of interest to exact a fee waiver in the circumstances of this case does, in any event, indicate bad faith, although neither petitioners nor the Solicitor General clearly define the standard. Petitioners concede that a plaintiff's burden of showing bad faith "would ordinarily be met when an offer, on its face, makes a 'totally inadequate provision for class counsel.'" Pet. Br. 36. Clearly the absolute waiver demanded here after two and a half years of litigation meets this test.

[37] Other "solutions" suggested by amici, such as providing notice to absent class members and allowing the settlement process itself to work out any problems, *see* States Br. at 57-58, would provide no help to plaintiff's counsel and no protection for the long-term interests of civil rights plaintiffs. The suggestion that the problem lies exclusively in the domain of state bar ethics committees, *see* Brief of the Council of State Governments, Amicus Curiae, *et al.*, 20, overlooks the power and the obligation of federal courts to determine when an award of fees is appropriate under Section 1988 and to preserve the purposes of that statute. *See* pp. 24-30 *supra*.

The court of appeals decision on the facts of this case provides a far more workable standard: where plaintiffs have a substantial claim on the merits for injunctive relief only, a fee waiver exacted by a defendant as a condition to a favorable settlement offer contravenes public policy and is therefore invalid.

C. The Court Of Appeals Correctly Declined To Invalidate The Entire Settlement Agreement.

Petitioners and their amici argue that, having found the fee waiver invalid, the court of appeals was obligated to invalidate the entire settlement agreement and remand the case to the district court for further proceedings. But federal courts have frequently modified fee provisions in settlement agreements without even questioning the validity of the rest of the agreement. *See, e.g., Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1929 (1984). Specifically, courts have held fee waiver provisions void as contrary to public policy while leaving the rest of the contract or settlement agreement intact. *E.g., Shadis v. Beal*, 685 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 970 (1982); *Gillespie v. Brewer*, 602 F. Supp. 218 (N.D. W. Va. 1985). *See* Wolfram, *supra*, 47 Law & Contemp. Probs. at 318 ("[t]he courts' general approach is to invalidate the entire contract only when the offending clause is an integral part of the contract and its excision makes the remainder of the contract impossible or seriously difficult to perform"); *Restatement (Second) of Contracts* § 184 (1981).

Petitioners' contention that the entire settlement agreement must fall is hardly surprising. Whenever a defendant has demanded a fee waiver as part of a settlement offer, gambling on the validity of the waiver, the defendant will contend that the agreement should fall in its entirety if the waiver is struck down. If it was wrong, however, for petitioners to demand a fee waiver as a

settlement condition in the circumstances of this case, it certainly would not be a proper remedy to allow petitioners to avoid their obligations under the rest of the agreement on the ground that they relied on the impermissible waiver. *See* Wolfram, *supra*, 47 Law & Contemp. Probs. at 318. Here, it was particularly appropriate for the court to hold the fee waiver invalid without disturbing the rest of the settlement agreement, since the agreement explicitly reserved the question of the waiver's validity for the court. *See* J.A. 104; p. 5 & n.4 *supra*. Since the entire settlement agreement had to be approved by the court under Rule 23(e), the inclusion of this language only in the fee waiver clause indicates that the court was to deal with the fee waiver provision separately.

Petitioners also contend that, even if the fee waiver was properly held invalid, the court of appeals should not have remanded for a "determination" of attorney's fees, since the district court could still deny *any* fees to respondents. In seeking such a remand, petitioners ask this Court to shut its eyes to the facts of this case. It is well established that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) (quoting in turn *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968))). *See El Club Del Barrio, Inc. v. United Community Corps.*, 735 F.2d 98, 100 (3d Cir. 1984) (recognizing the "presumption established in *Hensley* and *Piggie Park*" that prevailing plaintiffs should be awarded fees). It is equally plain that a plaintiff who enters a favorable settlement can recover fees, *see, e.g., Maher v. Gagne*, 448 U.S. 122 (1980); House Report, at 7, and that "'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley*, 461 U.S. at

433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). Simply put, "[t]he result is what matters." 461 U.S. at 435.[38]

There is simply no basis in the record for suggesting that respondents are entitled to no fees at all under the appropriate standards. *See* p. 6 *supra*. Neither in the district court, in response to the motion for costs and attorneys' fees, nor in the court of appeals, did petitioners contend that respondents were not "prevailing parties" or "maintain that there [was] any basis, apart from the stipulation, for the denial of attorneys' fees. . . . The [petitioners'] only contention [was] that the [respondents] should be bound by the stipulation waiving fees." *Jeff D. v. Evans*, 743 F.2d at 650.[39]

V. BARRING COERCED FEE WAIVERS WOULD NOT INTERFERE WITH THE LEGITIMATE INTERESTS OF DEFENDANTS IN SETTLING CIVIL RIGHTS SUITS.

Contrary to the assertions of petitioners and their amici, an affirmance in this case would not interfere with the public policy in favor of settling civil rights suits. If this Court makes it clear that coerced fee waivers will not be enforced, there will be a strong incentive to settle

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[38] *Hensley* stressed that "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention in the lawsuit. . . . [T]he court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." 461 U.S. at 435. The district court's granting summary judgment against respondents on certain claims thus provides no basis for denying fees, particularly since it left the core constitutional claims intact.

[39] Having never raised the argument below that respondents are otherwise not entitled to attorneys' fees under Section 1988, petitioners should not be permitted to raise this argument for the first time in this Court. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1492 n.5 (1985).

at an early stage rather than run the risks of neglecting settlement, going to trial, and incurring much larger fees after the case has been fully litigated. By contrast, if defendants know that a fee waiver will be upheld, the lack of any potential liability for fees will provide an incentive to delaying settlement. More importantly, to the extent coercive fee waiver demands promote settlement, it is only because defendants are allowed to "drive[] a wedge between . . . plaintiffs and plaintiff's counsel," Pet. Br. 37, to eliminate their liability under Section 1988. A tactic that "promotes" settlement, but fosters conflicts of interest, denies reasonable compensation to attorneys and undermines the purposes of a federal statute is contrary to public policy and should not be tolerated.[40]

Relying on *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 454 n.15 (1982), petitioners and their amici argue that a defendant has a "right to know" its total liability, including potential liability for attorney's fees. The ruling sought by respondents would not preclude a defendant from seeking fee information from plaintiffs or from negotiating an agree-

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[40] The Acting Solicitor General's contention that invalidating the fee waiver in this case would somehow discourage settlements in cases under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1982) ("EAJA"), is unpersuasive. *See* U.S. Br. at 13-14. The EAJA obligates the Government to pay counsel fees only when "the position of the United States was not substantially justified," 28 U.S.C. § 2412(d)(1)(B), whereas Section 1988 authorizes a fee award to a prevailing plaintiff even if the defendant took a substantially justified position. The higher threshold for obtaining fees under the EAJA makes it less likely that an attorney's decision to represent a party will be premised upon an expectation that his compensation will come from a fee award. In any event, the Government should not be permitted to circumvent its liability under the EAJA by demanding a fee waiver after litigating against its citizens without "substantial[] justifi[cation]."

ment on fees subject to court approval.[41] Petitioners never inquired into the amount of time respondents' attorneys spent on the case or made any effort to determine their potential liability for fees. They were only interested in obtaining an absolute fee waiver as a condition to a stipulation on the merits.

It is also unrealistic to assume that a defendant has no way of calculating the amount of attorney's fees a plaintiff will ultimately be awarded. Recent decisions of this Court on fee calculations make a reasonable estimate possible. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("the number of hours reasonably expended . . . multiplied by a reasonable hourly rate . . . provides an objective basis on which to make an initial estimate" of fees).[42]

Petitioners and several of their amici contend that fee waivers are necessary to settle "nuisance suits," which defendants may be willing to settle only if they can avoid liability for attorney's fees. Once again, this concern is not at issue here. Respondents pressed substantial constitutional and statutory claims concerning the treatment of emotionally and mentally disturbed children, and any suggestion that their suit was frivolous is belied by petitioners' decision to provide almost all of the injunctive relief sought. In any event, a fee waiver in the settlement of a true nuisance suit may be upheld under Section 1988,

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[41] *See* Committee on Professional and Judicial Ethics of the New York City Bar Ass'n, Op. No. 82-80 (1984) (defendants' counsel in civil rights cases ethically may request that plaintiffs' counsel supply fee information for estimating defendants' total liability).

[42] The Court also focused on the results obtained by plaintiffs, *see* 461 U.S. at 435, a factor which should be as apparent to defendants as to plaintiffs. Moreover, this and other factors affecting fee calculations often will be reflected in the hourly rates and the hours expended. *See Blum v. Stenson*, 104 S. Ct. 1541, 1548-50 (1984); *Hensley*, 461 U.S. at 434 n.9.

since a plaintiff who brings a non-meritorious suit would not qualify as a "prevailing party" entitled to fees. *See, e.g., Gram v. Bank of Louisiana*, 691 F.2d 728, 730 (5th Cir. 1982); *Chicano Police Officer's Association v. Stover*, 624 F.2d 127, 131 (10th Cir. 1980). Moreover, defendants have an array of weapons to combat frivolous litigation.[43] Petitioners' concern is not the frivolous, but the meritorious case, such as this one.

* * * *

In sum, petitioners and amici seek to divert the Court from the facts of this case and the only issue decided below—whether the fee waiver demanded by petitioners as a condition of a favorable settlement was properly invalidated as contrary to Section 1988 and the public policy it reflects. Petitioners' take-it-or-leave-it settlement proposal, offering substantial merits relief only if respondents waived all claims to fees, sought to create and exploit a conflict of interest between respondents and their counsel in order to avoid liability under Section 1988. The real harm from this tactic is not only to the lawyers or to the plaintiffs in a particular suit, but to future victims of civil rights violations who will go unrepresented. This is precisely the problem Congress sought to address in enacting Section 1988. Judicial enforcement of such fee waivers would undermine the purposes of Section 1988, leaving "our civil rights laws . . . mere hollow pronouncements which the average citizen cannot enforce." Senate Report, at 6.

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[43] Defendants can dispose of frivolous suits by filing a motion to dismiss under Rule 12(b)(6) or a motion for summary judgment under Rule 56. In addition, they may seek costs and attorney's fees under Section 1988 itself, and they may recover costs and fees from counsel under Rule 11 and 28 U.S.C. § 1927 (1982) if the litigation was frivolous or vexatious.

CONCLUSION

For the reasons stated above, respondents respectfully submit that the decision of the court of appeals should be affirmed.

Respectfully submitted,

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No. 84-1288

In The
Supreme Court of the United States
October Term, 1985

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK and WILLIAM GRUZINSKI,
Petitioners,

v.

JEFF D., PAULA E., JOHN M. and DUSTY R., Minors, By and Through Their Next Friend CHARLES JOHNSON, III, Individually and on Behalf of the Class They Represent, and MARK CLARY, Intervenor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
I. This appeal raises the question of the ethical propriety of simultaneous negotiations and the enforceability of simultaneously negotiated settlement agreements	1
II. The agreement in this case was voluntarily accepted, not coercively extracted and, as such, was properly approved by the district court	3
III. The alternatives offered by respondents are fatally defective	8
IV. Existing procedures suffice to resolve the problems raised in this appeal	15
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES

Hensley v. Eckerhart, 461 U.S. 424 (1983) 7, 17

Jeff D. v. Evans, 743 F.2d 648 (9th Cir. 1984), cert. granted, 105 S.Ct. 2319 (1985) 2, 3, 5, 8

Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985) 8

Maher v. Gagne, 448 U.S. 122 (1980) 17

Marek v. Chesney, 87 L.Ed.2d 1 (1985) 11, 18

Pennhurst v. Halderman, 465 U.S. 89 (1984) 6

Prandini v. National Tea Co., 557 F.2d 1015 (3rd Cir. 1977) 9, 12

STATUTES

Fed.R. of Civ.P. 23(e) 7, 10, 17

ARTICLES AND REPORTS

Manual for Complex Litigation (1982) 17

National Law Journal, July 8, 1985 3

Report of the Third Circuit Task Force, *Court Awarded Attorney's Fees*, draft of October 8, 1985 ..... 3, 17

I. This Appeal Raises the Question of the Ethical Propriety of Simultaneous Negotiations and the Enforceability of Simultaneously Negotiated Settlement Agreements

Petitioners noted in their opening brief that this appeal has generated an unprecedented amicus response, in terms of emotional intensity. (Pet. Br. at 31). Respondents and their amici have now demonstrated the same emotional intensity on behalf of the plaintiff bar. Amici for Respondents argue that Petitioners are defending a "coerced waiver tactic" that amounts either to an "ingenious construction" of the civil rights statutes or to a "devious strategem" to evade those statutes with the ultimate design of having this Court "cripple private civil rights enforcement" throughout the nation. Brief of Amici Curiae NAACP Legal Defense and Educational Fund, Inc., et al. at 36 n. 21; 19; and 39 [hereinafter cited as NAACP Br.]. Similarly, Petitioners stand accused of running "afoul of the duty to maintain the integrity of the legal profession," failing to represent our clients "within the bounds of the law," prejudicing "the administration of justice," and misusing the might of government "to coerce a settlement that evades the law and is unjust." Brief of Amicus Curiae Committee on Legal Assistance of the Association of the Bar of the City of New York at 23, 31 and 40 [hereinafter cited as NYC Bar Br.].

The rhetorical excesses of Respondents' amici, on the issue of simultaneous negotiation of merits and attorney's fees, were not unexpected. What was unexpected is Respondents' assertion that the question of whether "this Court should . . . impose a complete ban on 'simultaneous

negotiation of both merits and attorney's fees in class action settlements'" is "simply not presented by the record or the ruling below." Resp. Br. at 12.

Respondents are alone in this understanding of the case. The District Court Decision and Order of August 12, 1983 (J.A. 111-112), clearly stated that the issue was whether "it is ethical for attorneys admitted to practice before this Court to negotiate a waiver of attorney's fees and costs concurrently with the merits of the claims."

The Ninth Circuit saw this case as "an example of problems that have arisen when class action settlement negotiations have been undertaken in conjunction with negotiation of attorney's fees." *Jeff D. v. Evans*, 743 F.2d 648, 649 (1984). The Ninth Circuit used the occasion to affirm that it "has followed the seminal decision of the Third Circuit in *Prandini* and has disapproved simultaneous negotiation of settlements and attorney's fees." *id.* at 652, and then held that "[a]ttorney's fees should not have been a part of the settlement of the claims of the class." *Id.* Any reservations the Ninth Circuit may have had against adopting a *per se* ban on simultaneous negotiations were immaterial to this case.

Finally, the Supreme Court granted the petition for *certiorari* on the question of "whether the Court of Appeals erred in holding it unethical for parties in civil rights class actions to negotiate a settlement on the merits simultaneously with a settlement of attorney's fees and costs." Petition at i.

Respondents' amici concur that the ban on simultaneous negotiation is the key issue, and their key goal, on appeal. One asserts that "we endorse fully the reasoning of the court below in banning simultaneous negotiations in

civil rights cases." NYC Bar Br. at 4. Both argue strenuously that this Court should impose the same *per se* ban on simultaneous negotiations nationwide. *Id.* at 43-64; NAACP Br. at 51-61.[1]

II. The Agreement In This Case Was Voluntarily Accepted, Not Coercively Extracted And, As Such, Was Properly Approved By The District Court

The briefs of Respondents and their amici have misstated the facts of this case in numerous instances. This section of the brief will address only the most important of the misstatements.[2]

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1. The national bar obviously reads *Jeff D.* as representing a ban on simultaneous negotiations. "The 9th Circuit, whose decision the Supreme Court has decided to review, has also ordered restrictions similar to those imposed by the 3rd Circuit [in *Prandini*]." *National Law Journal,* July 8, 1985 at S4. Similarly, the Third Circuit Task Force of judges and lawyers reviewing attorney's fees problems, stated: "The current status of *Prandini* is uncertain, however, because on May 13, 1985, the Supreme Court granted *certiorari* in *Jeff D. v. Evans,* 743 F.2d 648 (9th Cir. 1984), a case in which the Ninth Circuit specifically follows *Prandini.*" Report of the Third Circuit Task Force, *Court Awarded Attorney Fees,* draft of October 8, 1985 at 37 n. 97 [hereinafter cited as Third Circuit Report].

2. There is not sufficient space in this brief to provide interlinear corrections of all misstatements. To begin at the beginning, one would correct the allegations on page 1 of respondents' brief that the case concerns "a class of over 2,000 indigent children," and that "many of these children were confined . . . in out-of-state treatment institutions located thousands of miles from their homes and families." One would note that the respondent class, at any time, numbers in the dozens, not the thousands; that the class encompassed both indigent and non-indigent members; and that the vast majority of out-of-state placements were made to Good Shepherd Home in Spokane, Washington, a city some 30 miles west of the Idaho border, because that facility is closer to the homes of children in the Coeur d'Alene area than are facilities in southern Idaho.

Respondents' Argument begins with the assertion that, "This case concerns coercive requests for waivers in civil rights cases, not a per se rule barring simultaneous negotiation of the merits of attorney's fees." Resp. Br. at 12. More precisely, Respondents argue that the "narrow question for decision" posed by this case is:

> whether a court in a civil rights action in which only injunctive relief is sought, may enforce a complete waiver of plaintiffs' right to costs and attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, where the defendant on the eve of trial has conditioned a settlement offer providing substantial relief on the merits on that waiver.

Resp. Br. at 7-8. Narrow, indeed. Amici for Respondents echo this narrow question. According to one, the question is:

> whether defendants in a civil rights case may coerce a waiver of statutory fees by knowingly creating a conflict of interest for plaintiffs' counsel, pitting the clients' interest in relief on the merits against counsel's interest in a fee.

NYC Bar Br. at 10. The other offers, as the "Question Presented," the following:

> May a court, in determining post-judgment fee entitlement under 42 U.S.C. 1988 in a case in which only injunctive relief is sought, approve a coerced waiver of all attorney's fees sought by defense counsel on the eve of trial as a condition of providing relief on the merits through a consent decree?

NAACP Br. at i.

The questions are tautologous in their simplicity. Should a defendant spring a trap on the eve of trial?[3] Of

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3. Again, a complete rebuttal would demonstrate that, far from announcing the waiver condition "on the eve of trial,"

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course not. Should a defendant engage in unethical tactics designed to coerce a waiver of statutory fees? Of course not. Should a court approve a coerced waiver as part of a consent decree? Of course not. Petitioners and their amici have never suggested that this Court, or any other court, give its blessing to "coercive waiver tactics."[4]

The telltale omission from all three briefs by Respondents and their amici is this key sentence in the Ninth Circuit's opinion:

> During the negotiations, the defendants offered virtually all of the injunctive relief plaintiffs had sought, and *more than the district court during earlier hearings had indicated it was willing to grant.*

Jeff D. v. Evans, 743 F.2d at 649-50 (emphasis added). In other words, it misstates the record to contend that Petitioners requested a waiver of attorney's fees "as the price for agreeing to substantial relief on the merits." NAACP Br. at 23, n. 17; NYC Bar Br. at 35; Resp. Br. at 6. In fact, Petitioners, in most particulars, rejected plaintiff's allegations and proposed resolutions, but offered relief other than what plaintiffs had requested and *more than they were legally entitled to* had the case gone to trial.

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petitioners had made the same offer on six previous occasions spanning 24 months—and that Respondents had accepted the identical offer in the other half of this case. In fact, it was Respondents who discovered and announced their "ethical dilemma" for the first time "on the eve of trial."

4. It goes without saying that Petitioners are also not seeking "judicial approval of a coerced waiver of fees." NAACP Br. at 36 n. 21. Nor do they subscribe to the premise that Congress intended "to allow [defendants to coerce] plaintiffs to waive attorney's fees." *Id.* at 36 n. 22. Petitioners' brief at 11, said no such thing and amici for Respondents had no right to amend it.

The district judge, who had followed the disposition of pleadings in this case for two years, knew that every decision addressing the merits of this case had been decided in Petitioners' favor. Of the nine causes of action listed in Respondents' Complaint (J.A. 4-31), the Third, Fifth, Sixth, and Seventh Causes of Action were resolved in Petitioners' favor by summary judgment, as was the State law claim in the Second Cause of Action. In retrospect, the Ninth Cause was beyond the district court's jurisdiction, under this Court's subsequent decision in *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89 (1984). The Fourth and Eighth Causes of Action were settled with the education Defendants, and included a voluntary waiver of fees. The remainder of the Complaint—the First Cause of Action, and the federal law part of the Second Cause of Action—were not ruled upon by the Court in summary judgment on the ground that genuine issues of material fact remained to be resolved. A comparison of the causes of action and the allegations supporting them listed in the Respondents' Complaint with the Court's ruling on summary judgment (J.A. pp. 56-57), clearly indicates that almost one year before the trial date the bulk of the legal claims in this lawsuit had been resolved in the Petitioners' favor.

Even more important than his detailed familiarity with the legal merits of plaintiffs' allegations, the district court judge knew that defendants were dedicating the money forgone in attorney's fees to improve institutional conditions for the plaintiff class beyond the level legally required. The judge knew, for instance, that the governmental defendants had voluntarily expanded the class of beneficiaries to include not just the designated class of emotionally and mentally handicapped children, but also

those subject to proceedings under the Youth Rehabilitation Act and the Child Protective Act. Further, the judge knew that defendants had taxed their limited resources to set aside facilities at State Hospital North as a special care program for the plaintiff class.

It is thus unfair to assert that the district court judge in this case "erred by failing to make any independent determination under Section 1988 of the reasonableness of denying all fees in this case." Resp. Br. at 29-30. The judge carried out his responsibilities under F.R.C.P. Rule 23(e) by weighing the strength of plaintiffs' case against the gratuitous relief offered by defendants. He found a *quid pro quo* sufficient to support a waiver of attorney's fees. Against this background, he did not find any unethical conduct on the part of counsel for plaintiffs or for defendants. The district court's judgment in this respect was entitled to deference by the appellate court. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1980). Unfortunately, the Ninth Circuit, in its haste to ban all simultaneously negotiated settlements, failed to examine the reasoning of the district court.

The decision of the Ninth Circuit should be overturned and the decision of the district court judge should be reinstated. If the decision of the Ninth Circuit is not overturned, then the entire settlement agreement should be held void. Respondents' amicus argues that the fee waiver is severable from the merits portion of the agreement because it was not "an essential part of the agreed exchange." NYC Bar Br. at 45. No one familiar with the case would make such an argument. There was no severability clause in the settlement agreement. The parties

and the district court agreed that the fee waiver provision was a material, substantive provision without which there would have been no settlement. (J.A. 115-116). See Restatement (Second) of Contracts §§ 159, 161-62, 167, 170-71 (1981). Defendants had a right to expect plaintiffs' attorney to live up to his bargain when he promised to abide by his waiver of attorney's fees, "if so approved by the Court." (J.A. 104). Under substantially similar circumstances, the First Circuit denied attorney's fees to the attorney for a prevailing plaintiff who reneged on his bargain. *Lazar v. Pierce,* 757 F.2d 435 (1985).

Respondents seek to avoid this result with a semantic play on the phrase "court approval." Respondents contend that, in agreeing to the stipulation, they meant approval by *either* the district or the appellate court. Resp. Br. in Opposition to Petition for Writ of Certiorari at 7. The Ninth Circuit had no illusions on this score. The court held that, "Defendants correctly assert that plaintiffs' counsel did indicate willingness to forego fees if the court approved." *Jeff D. v. Evans,* 743 F.2d at 650. Unfortunately, the Ninth Circuit went on to hold that the general rule requiring parties to live up to their stipulations "has limited applicability" in the context of civil rights settlement agreements and consent decrees. *Id.*

This Court would surely not endorse that sentiment. Instead, if the decision of the Ninth Circuit is affirmed, the entire agreement should be struck down and the parties should be allowed to return to the bargaining table or to test the merits of their claims at trial.

III. The Alternatives Offered By Respondents Are Fatally Defective

Respondents and their amici present several alternatives for this Court's consideration in resolving the prob-

lems presented in this appeal. On closer inspection, the alternatives are remarkably similar. First, of course, is an outright endorsement of the *Prandini* approach, i.e., a ban on simultaneous negotiations of merits and fees and a mandatory "bifurcated approach to settlement" negotiations. NYC Bar Br. at 62-63; NAACP Br. at 60.[5]

Second, amici suggest that this "Court should instruct the lower courts to take prompt action when the parties seek assistance" during negotiations pursuant to Rule 16, including "the entry of *Lisa F.* orders barring simultaneous negotiations of fees and the merits." NAACP Br. at 61 n. 41. This second alternative is, of course, the same as the first, with the additional wrinkle that plaintiffs are free either to engage in simultaneous negotiations or to turn to the district court for a protective order banning such negotiations. Prompt entry of such orders, upon request by plaintiffs' counsel, is said to be "the minimum judicial action necessary to assure at least a measure of compliance with Congress' purposes in enacting the Fees Act." *Id.*

The third alternative makes explicit this "extra bargaining-chip" strategy. The Court is asked to announce a ban "at least against defense initiated fee waivers in the context of merits negotiations." *Id.* at 60. As in the second alternative, plaintiff retains the option of initiating fee discussions or insisting on an absolute ban on simultaneous negotiations.

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5. The only other alternative, according to the New York City Bar Association's Committee on Legal Assistance, is "direct active supervision by the federal district courts of settlement negotiations in these cases." NYC Bar Br. at 9. This "alternative" is proposed half-heartedly, and examined not at all. It functions, apparently, only to raise the *in terrorem* spectre of massive expenditures of "scant judicial resources." *Id.*

Finally, amici suggest an after-the-fact approach under which "the Court at the very least must direct lower federal courts to give *special scrutiny* to simultaneously negotiated settlements when parties seek court approval of settlements pursuant to Fed. R. Civ. P. Rule 23(e)." *Id.* at 60-61 (emphasis added). It is understandable, given the history of "special scrutiny" case law, why the plaintiff bar would find this approach appealing. This approach, as in the present case, would allow plaintiff counsel to engage in simultaneous negotiations, strike a package deal on both merits and fees, then ask the district court to bind defendants on the merits but rewrite the agreement on fees.

These four alternatives all suffer from the same defects. First, they all represent a radical departure from the present duties of parties and district court judges under the Federal Rules of Civil Procedure. They rest on the premise that civil rights actions are so "unique" that they require the enunciation by this Court of unique ground rules for negotiations and for district court approval of resulting settlement agreements.[6]

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6. The supposed "uniqueness" of civil rights actions is argued by Respondents and their amici. See Resp. Br. at 18 ("the unique ability of defendants in petitioners' position to exploit a conflict of interest between plaintiffs and their counsel"); NAACP Br. at 9 ("The nature of civil rights practice makes civil rights lawyers uniquely vulnerable to coerced waivers of fees"); NYC Bar Br. at 6 ("pitting plaintiff counsel's duty to the client against his or her interest in a fee . . . is a problem peculiar to civil rights practice"). As Petitioners have stated earlier, the problem of "pitting plaintiff counsel's duty to the client against his or her interest in a fee" is one that ethical counsel cope with every day of the week in every law office across the land. Pet. Br. at 34. For example, plaintiff attorneys in worker's

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There is nothing in the Fees Act to indicate a congressional intent that civil rights actions be treated under radically different rules from other civil actions. On the contrary, as this Court recently made clear, "There is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned." *Marek v. Chesny,* 87 L.Ed.2d 1, 10 (1985). It is not logically consistent to allow a simultaneous offer of settlement under Rule 68 in civil rights cases, but prohibit such an offer during negotiations aimed at settling the case.

Second, as mentioned in Petitioner's Brief, the proposals by Respondents and their amici are unenforceable. Pet. Br. at 29-30. The Third Circuit Task Force recently concluded that:

> enforcement of the *Prandini* rules is difficult because the trial judge does not know if the parties have discussed fee matters . . . . It is suspected that fee discussions do take place and that agreements on fees are withheld from the court until after the settlement is approved.

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compensation cases face the everyday ethical dilemma of whether to urge the injured client to accept an insurance carrier's lump-sum settlement (with immediate payment of a sizable contingency fee) or to accept a multi-year stream of payments, with the additional benefit of assured medical coverage (but with the risk of delay or total loss in recoupment of the contingency fee). Similarly, the lawyer must counsel a client whether to accept an offer of 10% whole-man disability (after only a day's work for the contingency fee) or to go to trial in hope of getting a 20% whole-man disability rating (at the cost of perhaps weeks of additional effort by the attorney). These ethical dilemmas, and others like them, are not unique to civil rights attorneys.

Third Circuit Report at 37-38. In short, there is "a belief that *Prandini* is not being honored." *Id.* at 38. It would be ironic in the extreme for this Court to impose the *Prandini* rule nationwide at the exact time when the Third Circuit has completed an exhaustive study of its eight-year experiment of living with the rule only to determine that, "the problems posed by its administration have led many Task Force members to conclude that its difficulties exceed its benefits." *Id.* at 39.

Third, the harsh fact is that the alternatives proposed by Respondents and their amici tend to benefit plaintiff lawyers at the expense of plaintiff clients. Again, the eight-year history of life under the *Prandini* rule in the Third Circuit is instructive:

> Prandini *may well tend to discourage settlement.* Most members of the Task Force believe that *Prandini* tends to discourage settlement in some cases and, on occasion, makes it impossible.

Id. at 38 (emphasis in original). The Task Force pinpointed the precise reason why the *Prandini* rule discourages settlements, as follows:

> By preventing agreement at the time settlement of the merits is discussed, *Prandini* makes it difficult for the defendant to ascertain precisely what its liability will be, thereby eliminating the very certainty that makes settlement attractive to the defendant.

Id.

The bottom line is that defendants will not settle unless they know the bottom line. In this regard, the suggestion by Respondents and their amici that fee claims may be revealed, but not discussed, during negotiation on the merits is counter-productive. NYC Bar Br. at 37; Resp.

Br. at 37. The most likely outcome of this procedure is that defendants who are forbidden to discuss and settle fees simultaneously with the merits will take that information and simply plug in the highest amount claimed for plaintiff attorney's fees and use it as a "cushion" for determining how much more money can be made available to the plaintiff class for relief on the merits. Once the defendant's maximum exposure is ascertained (but not discussed), there will still be an incentive for defendants to contest the attorney's fees. But any reduction in attorney's fees now will benefit the defendant, not plaintiff's clients. This system proposed by Respondents and their amici guarantees that their clients will be the inevitable losers.[7]

Finally, Respondents' proposals do not really solve the fundamental problems raised by this appeal. Petitioners are not unaware of or unsympathetic to the ethical dilemmas of the plaintiff bar. But, to a person, every governmental attorney contacted on this issue feels that the ethical problem posed by this appeal is that of plaintiffs, not defendants.[8] It cannot be unethical, they believe, for a

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7. Respondents and their amici are perhaps willing to sacrifice these near-term concrete losses for individual plaintiffs so that plaintiffs in general may enjoy the continued availability of legal counsel to vindicate their civil rights. The status quo is predicted to result in an exodus of attorneys willing to litigate civil rights claims. Resp. Br. at 18; NAACP Br. at 2 and 8; NYC Bar Br. at 2 and 26. These deductive and anecdotal predictions do not square with the empirical evidence, which suggests that civil rights cases are exploding exponentially. Pet. Br. at 16 n. 5.

8. The ethical problem for plaintiff's attorney in this case stemmed from the incompatible roles he attempted to play. First, the attorney attempted to function as counsel for the

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defense attorney to tell the truth, i.e., to announce the terms under which his or her client will settle a lawsuit.

Respondents' proposals do nothing to shake this perception and resolve on the part of the defense bar. This Court, by imposing a ban on simultaneous negotiations, can impose silence on defense attorneys and simply deny them the right to reveal the terms under which their client will agree to settle. But the Court cannot force a defendant to settle. In fact, the likely outcome of a rule banning simultaneous negotiations, as the Third Circuit has discovered, is that the parties will be forced into an elaborate guessing game. Plaintiffs, who are allowed to initiate discussions of fees, will guess until they find out by process of elimination what terms a defendant will insist on.

Worse yet, the parties will be forced to invent new games. For example, the defendant may avoid discussions of a fee waiver but insist that the agreement on the merits contain a stipulation that the plaintiff is not a "prevailing party." Quaere as to whether this does not simply push the "coerced waiver tactic" back one step.

The problem is that defendants are faced with a structural Catch 22. The moment they agree to settle, they confer "prevailing party" status on plaintiffs. But defendants simply will not pay blackmail, in the form of at-

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plaintiff case. Next the attorney had himself appointed guardian ad litem for that same class. Finally, after leaving Idaho Legal Aid for private practice, he bound himself by contract with that organization. Under these circumstances, the plaintiff class had no voice at all and the effective "client" was the attorney's employer. The "wedge" in this case was driven not by defendants' offer but by plaintiffs' attorney's attempt to wear three such ill-fitting hats.

torney's fees, to settle what they perceive to be nuisance lawsuits.

Respondents and their amici reply that a bright line exists between the "ordinary case" and cases that are "noncatalytic," or "truly frivolous" or "nuisance" in nature. NYC Bar Br. at 38-39; NAACP Br. at 45-47. Unfortunately, lawsuits do not come labeled in this fashion. Nor do defendants believe they have a veritable "arsenal of procedural devices available, both to dispose of truly frivolous cases and to obtain compensation for defending them." NAACP Br. at 47. The result, quite simply, is that defendants in such suits will go to trial if they cannot achieve a full settlement, including a waiver of attorney's fees. Nothing in Respondents' proposals before this Court can change this fundamental fact.

IV. Existing Procedures Suffice To Resolve The Problems Raised In This Appeal

In the last analysis, the Supreme Court must decide whether, as Respondents and their amici allege, unethical behavior on the part of governmental attorneys is so rampant throughout the country that the normal rules of civil procedure must be overhauled to cope with the abuse; or whether, as Petitioners and their amici suggest, any problems of abuse are but isolated instances that may be adequately dealt with under existing rules of civil procedure.

Respondents and their amici rely on anecdotal and undocumented evidence to support their allegation of widespread ethical misconduct on the part of the defense bar and resulting disillusionment on the part of *pro bono* coun-

sel for plaintiffs.[9] Similarly, they rely upon subjective and self-serving assertions as to the virtues of the per se rules they call upon this Court to promulgate: either a complete ban on simultaneous negotiations, or a ban at plaintiff's discretion, or a court review process skewed in plaintiff's favor under a "special scrutiny" ground rule.[10]

By contrast, Petitioners have turned to objective third parties, the presiding judges and their neutral, or at least balanced, study commissions in support of their contention that the vast majority of offers made by government attorneys during negotiations are made in good faith. See Pet. Br. at 35-36. Empirical evidence has been adduced for the proposition that present practice does not discourage the plaintiff bar. Pet. Br. at 16. An analytical framework was provided to demonstrate the essential incompatibility of Respondents' preferred alternatives with the fundamentals of "principled negotiations." Pet. Br. at

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9. For example: "We know of attorneys who have abandoned civil rights practice because of the widespread use of tactics such as those employed by the petitioners' attorneys in the present case." NAACP Br. at 17 n. 13.

10. Respondents and their amici argue that "approval of petitioners' approach would have the undeniable effect of removing fee entitlement from virtually all cases where plaintiffs prevail through settlements or consent decrees." NAACP Br. at 37. Support for this remarkable contention is found in the alleged admission by petitioners and their amici that "prevailing principles . . . require defense counsel to seek a waiver (not a compromise) of fees as part of any settlement in a civil rights case." *Id.* at 18. It is symptomatic of the paranoia of the defense bar that all three briefs purport to find this admission in the briefs of Petitioners and their amici. See Resp. Br. at 25; NAACP Br. at 18; NYC Bar Br. at 21-22, 43. Petitioners respectfully request the Court to peruse the citations offered as proof of this alleged admission. Not one of them supports the allegation. See Pet. Br. at 31-35; Br. of Alabama, et al., at 52-53; U.S. Br. at 23; City of New York Br. at 13.

26-28. Finally, the results of a comprehensive study have been presented showing that the only circuit with long-term experience under a per se ban on simultaneous negotiations has concluded that the ban is neither enforceable nor desirable. Third Circuit Report at 37-38.[11]

The conclusion is that the existing Rule 23(e) procedure, as applied to proposed consent decrees settling civil rights class action lawsuits, is not in need of drastic overhaul, but rather is adequate to deal with individual and systemic problems as they arise. Judicial scrutiny under Rule 23(e), subject to appellate review, provides a flexible tool for carrying out the goals of the Fees Act, as authoritatively construed by this Court in *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) ("a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' "); and *Maher v. Gagne*, 448 U.S. 122, 129 (1980) ("fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees").

These principles must be applied by the district court in a case-by-case exercise of its Rule 23(e) powers. The factors to be considered include: the strength of plaintiff's case; the history of negotiations; the extent of relief offered; the likelihood of success at trial, *Manual for Complex Litigation* §§ 1.46 and 1.47 (1982); and, as correctly

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11. In fairness, it should be noted that the Third Circuit Task Force was not unanimous in concluding that a per se ban discourages settlement: "At least one member of the Task Force disagreed with the assertion that *Prandini* discourages settlement. The judges on the Task Force, however, were in agreement on this proposition." Third Circuit Report at 38 n. 101.

noted by Respondents and their amici, the immediacy of plaintiff's need and the impact of deliberate delay on that need.[12]

If this conclusion is unexciting, so be it. It is not the first time that this Court has reaffirmed basics as the means of carrying out the goals of the Civil Rights Act and the Fees Act. *Marek v. Chesny*, 87 L.Ed.2d 1 (1985).

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CONCLUSION

The facts of this case do not support the contention of Respondents and their amici that a "coercive waiver tactic" was employed. Rather, Petitioners offered a *quid pro quo* in exchange for the waiver of attorney's fees and had a right to expect plaintiffs' attorney to live up to his bargain when he promised to abide by a waiver of fees, "if so approved by the Court." The district court, after briefing and a hearing, approved the entire settlement

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12. In this regard, the final and most serious instance of Respondents' misrepresentation of the record cannot stand uncorrected. Respondents and their amici allege that their ethical dilemma was particularly cruel in this instance because any delay in accepting defendants' offer would subject their clients to possible sexual molestation and rape. Resp. Br. at 9, 19; NYC Bar Br. at 21. The fact is that these precise allegations were brought before the district court by plaintiffs in a motion for preliminary injunction; after extensive briefing, argument and investigation, the district court denied the motion for preliminary injunction and its allegation that plaintiffs were in a situation of imminent danger. This ruling, which was not challenged by plaintiffs' counsel in any manner, occurred a full year before defendants' offer of settlement. It cannot be relitigated on appeal.

agreement, including the fee waiver. The Ninth Circuit's reversal of that decision should be overturned and the judgment of the district court reinstated.

The objective evidence suggests that the problem of unethical governmental attorneys exacting "coercive waivers" is not widespread and that the existing rules of civil procedure can cope with it. There is no evidence to support the contention of Respondents and their amici that a new rule of civil procedure must be devised to cope with this narrow problem, or that any of their proposals would, in fact, improve the situation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK and WILLIAM GRUZINSKI,
Petitioners,

v.

JEFF D., PAULA E., JOHN M. and DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE DECISION BELOW BARRING SIMULTANEOUS NEGOTIATION OF ATTORNEY'S FEES AND THE MERITS IN A CIVIL RIGHTS CLASS ACTION UNDERMINES THE POLICY FAVORING VOLUNTARY RESOLUTION, IMPOSES AN OVERBROAD RULE WHICH OVERLOOKS THE ROLE OF THE DISTRICT JUDGE IN OVERSEEING THE SETTLEMENT OF THE CLAIM, AND FAILS TO AFFORD SUFFICIENT DISCRETION TO THE DISTRICT COURT	7
A. The Policy Favoring Voluntary Resolution of Civil Rights Class Actions Supports a Rule Permitting Simultaneous Negotiation	8
B. The Standard Used by the Court Below, that Simultaneous Negotiation is Presumptively Unethical and Must be Reversed Even if Approved by the District Judge, is Overbroad	16
C. The Court Below Erred When it did not Defer to the District Court's Approval of the Settlement, Since Such Approval did not Constitute an Abuse of the District Court's Discretion	22
II. IF THIS COURT HOLDS THAT SIMULTANEOUS NEGOTIATION WAS IMPROPER IN THE INSTANT CASE, THE PARTIES SHOULD BE ALLOWED TO RENEGOTIATE OR PROCEED TO TRIAL ON THE MERITS IF UNABLE TO REACH AGREEMENT	23
CONCLUSION	26

TABLE OF AUTHORITIES

Cases: Page

Airline Stewards and Stewardesses Ass'n, Local 550 v. TWA, Inc., 630 F.2d 1164 (7th Cir. 1980), *petition for rehearing denied*, 456 U.S. 940 (1982) 8

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 8, 9

Alliance To End Repression v. City of Chicago, 561 F. Supp. 537 (N.D. Ill. 1982) 25

Armstrong v. Board of School Directors, 471 F. Supp. 800 (E.D. Wis. 1979), *aff'd*, 616 F.2d 305 (7th Cir. 1980) 25

Brown v. General Motors Corp., 722 F.2d 1009 (2d Cir. 1983) 18

Carson v. American Brands, Inc., 450 U.S. 79 (1981) 3, 8

Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980) 8, 15

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 3

Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977) 8, 23

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 12

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) 8

Gram v. Bank of Louisiana, 691 F.2d 728 (5th Cir. 1982) 9, 15

Hensley v. Eckerhart, 461 U.S. 424 (1983) 3

Herman v. Eagle Star Insurance Co., 396 F.2d 427 (9th Cir. 1968) 10

In Re Armored Car Antitrust Litigation, 472 F. Supp. 1357 (N.D. Ga. 1979), *modified on other grounds*, 645 F.2d 488 (5th Cir. 1981) 22

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Jeff D. v. Evans, 743 F.2d 648 (9th Cir. 1984), *cert. granted*, 105 S.Ct. 2319 (1985) 5, 9, 10, 22

Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985) 3, 6, 8, 9, 15, 17, 19

TABLE OF AUTHORITIES—Continued

Page

Marek v. Chesney, 53 U.S.L.W. 4903 (U.S. June 25, 1985) (No. 83-1437) 11, 14
McDonald v. Chicago Milwaukee Corp., 565 F.2d 416 (7th Cir. 1977) 15
Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) 6, 23, 25
Miller v. Republic National Life Insurance Co., 559 F.2d 426 (5th Cir. 1977) 23
Moore v. National Ass'n of Securities Dealers, Inc., 762 F.2d 1093 (D.C. Cir. 1985), *petition for reh'g filed* July 8, 1985, *decision held in abeyance* pending *Evans v. Jeff D.* (U.S. No. 84-1288) 3-4, 13, 15-18, 21
Obin v. District No. 9, Int'l Ass'n of Machinists and Aerospace Workers, 651 F.2d 574 (8th Cir. 1981) 15
Patterson v. Stovall, 528 F.2d 108 (7th Cir. 1976).. 25
Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) 8, 15
Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982) 25
Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) 15, 22
Skoda v. Fontani, 519 F. Supp. 309 (N.D. Ill. 1981) 10
United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) 25
United States v. Armour & Co., 402 U.S. 673 (1971) 24
United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980) 23
United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981) 23
United States v. Trucking Employers, Inc., 561 F.2d 313 (D.C. Cir. 1977) 10
United Steelworkers v. Weber, 443 U.S. 193 (1979) 8

TABLE OF AUTHORITIES—Continued

	Page
Webb v. Board of Educ. of Dyer County, 105 S.Ct. 1923 (1985)	3
White v. New Hampshire Dept. of Employment Sec., 629 F.2d 697 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982)	9
White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445 (1982)	5, 11
W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983)	3, 8
Statutes:	
Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*...	2
Section 1981, 42 U.S.C. § 1981	2
Section 1983, 42 U.S.C. § 1983	4
Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988	2, 4, 5, 8, 10, 17
Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*	2
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*	2
§ 2000e-5(K)	2
Legislative Materials:	
H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in*, 1964 U.S. Code Cong. & Ad. News 2355, 2393..	8
Rules:	
Rule 16, Fed. R. Civ. P.	18
Rule 23(e), Fed. R. Civ. P.	4, 18, 21
Rule 68, Fed. R. Civ. P.	11-14
Miscellaneous:	
Advisory Opinion No. 39, State Disciplinary Board of the State Bar of Georgia (July 20, 1984)	19
American Bar Association, *Model Code of Professional Responsibility*, as amended	21
American Bar Association, *Model Rules of Professional Conduct*	21

TABLE OF AUTHORITIES—Continued

Page

Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988*, 55 U. Colo. L. Rev. 341 (1984) 14, 18

Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal and Ethical Considerations*, 131 U. Penn. L. Rev. 793 (1983) 10, 16-17

District of Columbia Bar Legal Ethics Committee, Opinion No. 147, *reprinted in* 113 The Daily Washington Law Reporter 389 (1985) 17

Draft *Manual for Complex Litigation* (2d ed. 1985) 17

Final Subcommittee Report of the Committee on Attorneys Fees, *reprinted in* Bar Report, Aug./Sept. 1984 at 4 (April 11, 1984) 20

G. Hazard, Jr. and W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1985) 21

Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees are Authorized*, 14 Clearinghouse Rev. 515 (1980) 18, 22

Manual for Complex Litigation (1982) 21-22

New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 80-94 (1981) 19

New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 82-80 (1984) 19

Note, *Attorneys' Fees-Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fee in a Title VII Class Action*, 51 Temple L.Q. 799 (1978) 13, 14

C. Wright & A. Miller, *Federal Practice and Procedure* (1972) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1288

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK and WILLIAM GRUZINSKI,
Petitioners,

v.

JEFF D., PAULA E., JOHN M. and DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the petitioners with written consent of all parties. The parties' consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council ("EEAC") is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to various civil rights and equal employment laws, including Titles VI and VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d, *et seq.* and 2000e, *et seq.* Many EEAC members are signatories to conciliation agreements, consent decrees or other voluntary resolutions of civil rights or employment discrimination charges. This case concerns simultaneous negotiation of the merits and attorney's fees of a civil rights claim under 42 U.S.C. § 1988, which covers employers subject to 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* In addition, a "prevailing party" under Title VII is permitted "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 2000e-5(k). Thus, EEAC has a direct interest in the issue presented for the Court's consideration in the instant

case—*i.e.*, whether the court of appeals erred in disapproving a waiver of attorney's fees and costs negotiated simultaneously with the merits as part of a settlement approved by the lower court.

The decision by the Ninth Circuit barring nearly all simultaneous negotiation of fees and the merits would greatly reduce the number of class action settlement negotiations involving Title VII and other discrimination and civil rights statutes. An employer must know at the time of settlement the total cost, including attorney's fees, of the settlement agreement. Moreover, the Ninth Circuit's approach frustrates the policy encouraging voluntary compliance and the settlement of civil rights class actions, Title VII and other discrimination laws. *See, e.g., W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983). Clearly, the voluntary resolution through settlement, especially where a class action is involved, "constitutes the best quality of justice, and the highest service, that counsel can perform in the interest of his client and the administration of the judicial system." *Lazar v. Pierce*, 757 F.2d 435, 440 (1st Cir. 1985) (Torruella, J., concurring on separate grounds).

Because of its interest in urging the settlement of employment discrimination cases, EEAC has filed briefs as amicus curiae with this Court in *W.R. Grace & Co.*, *supra* and *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981). In addition, because of its interest in the issue of attorney's fees, EEAC has filed briefs in *Webb v. Board of Educ. of Dyer County*, 105 S.Ct. 1923 (1985); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), among others. In addition, EEAC filed a brief as amicus curiae in *Moore v. National Ass'n of Securities Dealers*,

Inc., 762 F.2d 1093 (D.C. Cir. 1985), *petition for reh'g filed* July 8, 1985, *decision held in abeyance*, a case which discusses the decision of the court of appeals below, and which deals at length with the issue addressed herein.

STATEMENT OF THE CASE

The attorney for a class of plaintiffs ("plaintiff") sued various officials of the State of Idaho ("defendant"), alleging violations of several federal and state constitutional and statutory provisions. The complaint, filed pursuant to 42 U.S.C. § 1983, sought declaratory and injunctive relief, as well as attorney's fees and costs, pursuant to 42 U.S.C. § 1988.

The action included claims for educational and mental health services on behalf of Jeff D. and other children. The parties settled the educational services claim and, following the completion of extensive discovery, began settlement negotiation regarding the mental health services claim. Defendant offered the injunctive relief requested by plaintiff, but conditioned settlement upon plaintiff's waiver of attorney's fees and costs. Plaintiff agreed to negotiate a settlement with a stipulation that the simultaneous negotiation of fees must be approved by the district court. (J.A. 104-105).[1]

The district court found the practice of negotiating fees along with the merits ethical, and approved the settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. (J.A. 93-94). Plaintiff then filed a motion for attorney's fees and costs, which the court denied based on the settlement. (J.A. 106-07). Plaintiff appealed.

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[1] "J.A." refers to the Joint Appendix.

The Court of Appeals for the Ninth Circuit reversed the judgment of the district court, and remanded for a determination of reasonable attorney's fees. The Ninth Circuit held that the lower court erred in approving plaintiff's waiver of attorney's fees simply because it was part of the settlement, concluding that absent unusual circumstances, "[t]he historical background of both Rule 23 and section 1988, as well as our experience since their enactment, compel the conclusion that a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court." *Jeff D. v. Evans*, 743 F.2d 648, 652 (9th Cir. 1984), *cert. granted*, 105 S. Ct. 2319 (1985). Defendant appealed.

SUMMARY OF ARGUMENT

The overriding public interest in favor of class action settlements supports the simultaneous negotiation of attorney's fees along with the merits. While Section 1988 permits an award of attorney's fees to a successful plaintiff, fees may be waived as long as the waiver is "voluntary and knowing." In addition, the adoption of a strict rule preventing simultaneous negotiation except in unusual circumstances would result in fewer class action settlements because defendants must know the full extent of liability while contemplating settlement. *See, e.g., White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 453 n. 15 (1982). Further, a bifurcated court settlement process would permit the leverage of a weak claim, consume inordinate amounts of judicial resources, require a judge to determine the reasonableness of a plaintiff's request on the merits without regard to the reasonableness of the fee request, and

cause practical and logistical problems for the court system. *See Lazar*, 757 F.2d 435.

While plaintiff's concern regarding the dilemma faced in simultaneous negotiation has some initial appeal, the overbroad rule adopted by the Ninth Circuit would prevent simultaneous negotiation in many proper instances. For example, simultaneous negotiation should be permitted when plaintiff initiates the waiver of fees, when defendant offers a "lump sum" settlement, or when there exists a carefully drafted retainer agreement or written consent from all parties. Further, the overbroad rule adopted by the Ninth Circuit below creates a presumption that simultaneous negotiation is unethical, when in fact plaintiff should bear the burden of showing why it did not prepare for the dilemma with a retainer agreement, or raise the issue with the lower court judge with a motion or when presenting the proposed settlement.

The Ninth Circuit below also failed to defer to the lower court's approval of the settlement even though the district judge considered the ethical dilemma and exercised his discretion to approve the settlement. Thus, the Ninth Circuit improperly reversed the lower court, even though it made no finding that the lower court abused its discretion in approving the settlement. *See, e.g., Mendoza v. United States*, 623 F.2d 1338, 1348 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

As an alternative, if this Court finds the simultaneous negotiation herein to have been improper, the parties should be allowed to renegotiate the settlement or proceed to trial. Defendant agreed to plaintiff's demand on the merits as a condition to the

waiver of fees. The award of both the merits relief agreed to and fees to plaintiff would result in an impermissible alteration of the agreement and would impose a term materially different from that agreed upon.

ARGUMENT

I. THE DECISION BELOW BARRING SIMULTANEOUS NEGOTIATION OF ATTORNEY'S FEES AND THE MERITS IN A CIVIL RIGHTS CLASS ACTION UNDERMINES THE POLICY FAVORING VOLUNTARY RESOLUTION, IMPOSES AN OVERBROAD RULE WHICH OVERLOOKS THE ROLE OF THE DISTRICT JUDGE IN OVERSEEING THE SETTLEMENT OF THE CLAIM, AND FAILS TO AFFORD SUFFICIENT DISCRETION TO THE DISTRICT COURT

In the instant case, the district court judge approved the voluntary settlement by plaintiff and defendant of attorney's fees and the merits in a civil rights class action. The court of appeals, however, reversed the bargained settlement, creating a rule that would permit simultaneous negotiation of attorney's fees, if at all, only in very narrow and unusual circumstances. As will be shown below, the Ninth Circuit's rule conflicts with and undermines the policy of voluntary resolution of claims. In addition, the court's rule overstates the need for a restrictive ban on simultaneous negotiation, since there are many instances in which such negotiations should be permitted to take place, and since the district court's close supervision will prevent any improper settlements.

A. The Policy Favoring Voluntary Resolution of Civil Rights Class Actions Supports a Rule Permitting Simultaneous Negotiation

The language of Section 1988 neither prohibits nor approves the simultaneous negotiation of fees with the merits, simply stating that a court may, in its discretion, allow fees to a prevailing party. 42 U.S.C. § 1988. Courts have emphasized, however, the "overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved." *Lazar* v. *Pierce*, 757 F.2d 435, 440 (1st Cir. 1985) (Torruella, J., concurring on separate grounds). *See Airline Stewards and Stewardesses Ass'n, Local 550 v. TWA, Inc.*, 630 F.2d 1164 (7th Cir. 1980), *petition for rehearing denied*, 456 U.S. 940 (1982); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977).[2]

In addition, Section 1988 does not mandate an award of fees to a prevailing party, but rather authorizes a court, in its discretion, to award them. This authorization certainly does not prevent a knowing and conscious waiver of fees. *See, e.g., Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127 (10th

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[2] This policy favoring compromise and settlement is particularly strong in employment discrimination cases, where both Congress and the courts clearly have recognized that voluntary compliance is the preferred means of eliminating employment discrimination. *See, e.g., W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 770-71 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981); *United Steelworkers v. Weber*, 443 U.S. 193, 203-04 (1979); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1214 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in*, 1964 U.S. Code Cong. & Ad. News 2355, 2393.

Cir. 1980); *White v. New Hampshire Dept. of Employment Sec.*, 629 F.2d 697, 701 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982). *See also Gram v. Bank of Louisiana*, 691 F.2d 728 (5th Cir. 1982). As the concurring judge in *Lazar* explained:

> It cannot be questioned but that, in an appropriate case, plaintiffs, including those in a class action, can accept a settlement without any monetary damages being recovered notwithstanding that the suit initially included such a claim, or that the same result cannot be achieved with respect to equitable relief, or costs. In fact, *if constitutional rights can consciously be waived by a defendant in a criminal case, it would be an excess in paternalism to conclude that parties to a civil dispute cannot do likewise.*

Lazar, 757 F.2d at 439 (emphasis supplied) (footnote omitted).

The Ninth Circuit conceded that plaintiff "did indicate willingness to forego fees if the court approved," and noted that stipulations generally are binding upon the parties. *Jeff D. v. Evans*, 743 F.2d 648, 650 (9th Cir. 1984), *cert. granted*, 105 S. Ct. 2319 (1985). The Ninth Circuit, however, improperly engaged in the "excess in paternalism" described in *Lazar* when it reversed the bargained settlement, reasoning that plaintiff was not allowed to waive attorney's fees as part of a simultaneous negotiation of fees and the merits.

This Court, in *Alexander v. Gardner-Denver Co.*, 415 U.S. at 52, clearly indicated that "an employee may waive his cause of action under Title VII as part of a voluntary settlement." This Court further stated that "[i]n determining the effectiveness of any such waiver, a court would have to determine at the

outset that the employe's consent to the settlement was voluntary and knowing." *Id.* at 52 n. 15; *see also United States v. Trucking Employers, Inc.*, 561 F.2d 313, 318 (D.C. Cir. 1977). The consent given by plaintiff in the instant case was both voluntary and knowing. Certainly, there is no countervailing reason why a waiver of attorney's fees and costs in a Section 1988 class action should not be governed by the same principle of "voluntary and knowing" waiver. *See e.g., Herman v. Eagle Star Insurance Co.*, 396 F.2d 427 (9th Cir. 1968).

In fact, the only possible explanation given by the court below why a plaintiff is not bound by a voluntary and knowing waiver of attorney's fees which has been approved by a district court is that there exists a "clear public policy of 42 U.S.C. § 1988 to award reasonable attorney's fees in civil rights actions." *Jeff D.*, 743 F.2d at 650. Such an argument hardly constitutes sufficient grounds for making attorneys' fees unwaivable. While plaintiff claims that the instant "class action would probably never have been brought without the attorneys' fees provision of 42 U.S.C. § 1988," see Reply Brief in Opposition to Petition for Writ of Certiorari at 10, one court has observed that "it is doubtful that Congress envisioned that [Section 1988] would become the catalyst for litigating a claim which otherwise would be settled." *Skoda v. Fontani*, 519 F.Supp. 309, 310 (N.D. Ill. 1981). *See* Comment, *Settlement Offiers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal and Ethical Considerations*, 131 U.Penn. L. Rev. 793, 816 (1983).

The Ninth Circuit below similarly neglected to consider the practical ramifications that the adop-

tion of its rule would have in the settlement process. The settlement of cases involves a careful negotiating process in which the parties seek to resolve their differences based upon, among other factors, their evaluation of the evidence, their likelihood of success on the merits, their potential liability for costs and fees, and the overall "costs" of litigation. The viability of any settlement rests largely on the ability of each party to gauge precisely what it will and will not receive through the settlement. This delicate balance that is essential to the settlement process would be undermined if either party (in this case the defendant) were uncertain as to the ultimate liability incurred under a settlement agreement.

In *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445 (1982), this Court was asked to adopt a rule deferring fee negotiations until after the entry of judgment. In rejecting such a rule, Justice Powell stated that:

> In considering whether to enter a negotiated settlement, *a defendant may have good reason to demand to know his total liability from both damages and fees.* Although such situations may raise difficult ethical issues for plaintiff's attorney, *we are reluctant to hold that no resolution is ever available to ethical counsel. Id.*, at 453-54 n.15 (emphasis supplied).

The recognition by Justice Powell in *White* that a defendant has good reason to want to know the total liability incurred in a settlement was echoed recently in Chief Justice Burger's opinion in *Marek v. Chesney*, 53 U.S.L.W. 4903, 4905 (U.S. June 25, 1985) (No. 83-1437). The Chief Justice noted that defendant's offer under Rule 68 of the Federal Rules of

Civil Procedure must "be one that *allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued.*" (emphasis by the Court). This Court reasoned:

> This construction of the Rule best furthers the objective of the Rule, which is to encourage settlements. If defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff.

Id.

In fact, Chief Justice Burger and Justice Rehnquist, in their dissent in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), reasoned persuasively that attorney's fees should be subject to settlement and compromise under Rule 68. Justice Rehnquist stated that:

> Were we to hold that attorney's fees were *not* subject to settlement and compromise (in the same way as the issues of liability, damages, and other remedies) as a part of a Rule 68 offer, we would frustrate the purpose of this Rule. *The defendant would be put in the unenviable position of having to make an offer of judgment without knowing what his potential liability in terms of attorney's fees would be* over and above the amount of the Rule 68 offer. *Id.*, at 379 n.5 (emphasis supplied).

Justice Rehnquist went on to state that the uncertainty of liability for fees "will most likely prove to deter the client from making a Rule 68 offer in the first place, with the result that fewer suits will be settled and more will be tried." *Id.* Thus, the practical effect of the rule adopted by the Ninth Circuit will be that fewer defendants will consider a settlement on the merits if liability for attorney's fees is still unknown. This effect clearly frustrates the purpose of the various civil rights statutes, which is to encourage negotiation and settlement.

On the other hand, permitting the simultaneous negotiation of fees and merits ultimately could lead to a desirable result, depending upon the strength or weakness of plaintiff's case. Senior Circuit Judge MacKinnon, writing for the court in *Moore*, explained that:

> a plaintiff's costs and fee waivers are most likely to occur in instances where the plaintiff's case is relatively weak and the defendant is willing to predict with some degree of certainty that it would prevail on the merits should the case proceed to trial. Where a plaintiff's case is relatively stronger, the plaintiff's bargaining power will be commensurately greater. Thus, the plaintiff should be able to exact additional concessions from the defendant, including fees and costs.

Moore v. *National Ass'n of Securities Dealers, Inc.*, 762 F.2d 1093, 1105 (D.C. Cir. 1985), *petition for reh'g filed* July 8, 1985, *decision held in abeyance. See* Note, *Attorneys' Fees-Conflicts Created by Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fees in a Title VII Class Action*, 51 Temple L.Q. 799, 811 (1978). By preventing simultaneous negotiations, the court below would improperly create a rule encouraging the lever-

age of a weak claim, while it should encourage the proper settlement of such a case long before it crowds the court's calendar.

In addition, the decision of the court below would lead to a "bifurcated" court settlement process involving a first-stage resolution of the merits and a second-stage negotiation of attorney's fees. This Court rejected the plaintiff's argument that Rule 68 of the Federal Rules of Civil Procedure mandates a bifurcated offer, noting that the rule does not "require that a defendant's offer itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs." *Marek*, 53 U.S.L.W. at 4905. In fact, this form of negotiation is hardly superior to the simultaneous negotiation of fees and merits in any context; rather, the method is so replete with problems as to render it unworkable. First, even its supporters concede that there would have to be increased judicial involvement in the two stage process "necessitating expenditure of additional and inordinate amounts of judicial resources." *See* Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988*, 55 U. Colo L. Rev 341, 373 (1984). Second, a bifurcated approach would lead to a segregation of the facts, making the district judge determine the reasonableness of plaintiff's claim on the merits without regard to the reasonableness of the fee request. 51 Temple L.Q. at 812. Finally, the bifurcated approach would lead to practical and logistical problems for the court system. As the concurring judge in *Lazar* noted:

> Last, we should point to the overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved. In these days of crowded court calen-

> dars, complex disputes, and tardy results, there can be no doubt but that the voluntary resolution of litigation through settlement, constitutes the best quality of justice, and the highest service, that counsel can perform in the interest of his client and the administration of the judicial system. The removal of attorney's fees from the arena of voluntary and ethical negotiation in civil rights cases would present an unnecessary discouragement to non-litigious disposition of these controversies.

Lazar, 757 F.2d at 440 (Torruella, J., concurring on separate grounds) (footnote omitted).[3] Thus, it is clear that the policy of voluntary resolution in civil rights class actions supports simultaneous negotiation of fees and the merits. This same policy does

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[3] Other circuits have decided against following a rule like that established by the Ninth Circuit. The First Circuit, as noted fully, *supra*, permits waiver of attorney's fees. *Lazar*, 757 F.2d at 438. The Fifth Circuit approves of a plaintiff's waiver of attorney's fees in a negotiated settlement, *Gram*, 691 F.2d at 730, but cautions that simultaneous negotiations "may raise serious ethical concern." *Pettway*, 576 F.2d at 1216 n. 71. The Seventh Circuit has upheld simultaneous negotiation, albeit without discussion of the *per se* rule articulated in *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977). *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 426 (7th Cir. 1977). Even the Eighth Circuit refrained from adopting a *per se* rule, while it noted the potential conflict of interest in simultaneous negotiation, which the trial judge must scrutinize closely. *Obin v. District No. 9, Int'l Ass'n of Machinists and Aerospace Workers*, 651 F.2d 574, 582-83 (8th Cir. 1981). In *Chicano Police Officer's Ass'n*, 624 F.2d at 132, the Tenth Circuit noted that plaintiffs could waive fees as part of the settlement, even though the case was remanded on another issue. Finally, as discussed fully, *infra*, the District of Columbia Circuit permitted a plaintiff's voluntary waiver of fees during simultaneous negotiation. *Moore*, 762 F.2d at 1110.

not support the unworkable bifurcated system of settlement adopted by the Ninth Circuit.

B. The Standard Used by the Court Below, that Simultaneous Negotiation is Presumptively Unethical and Must be Reversed Even if Approved by the District Judge, is Overbroad

The concerns expressed by plaintiff regarding the dilemma faced in simultaneous negotiation of attorney's fees and the merits in a class have some superficial appeal. These concerns, however, are not compelling when examined closely. In fact, the strict rule adopted by the Ninth Circuit, that simultaneous negotiation is presumptively unethical, does not comport with reality. As evidence of this, both courts and local bar organizations have recognized instances in which simultaneous negotiation should be allowed.

For example, the plaintiff in *Moore* initiated settlement negotiation and introduced for the first time the fee waiver settlement offer. Contrary to plaintiff's charges, the court found that defendant never "demanded" a fee waiver; rather defendant declined plaintiff's initial offers of settlement. *Moore*, 762 F.2d at 1102, 1104.[4] The court held that such an offer "poses no threat to the policies of Title VII enforcement while furthering the public policy in favor of encouraging voluntary settlement of disputes." *Id.* at 1110. Absent coercion, even opponents of simultaneous negotiation agree that a plaintiff's offer of waiver

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[4] Significantly, the majority rejected the dissent's proposed rule characterizing simultaneous negotiations as "presumptively invalid absent 'unusual circumstances,'" (the rule adopted by the court of appeals in the instant case) as displaying an implicit lack of trust in an attorney's ability to engage ethically in negotiations. *Id.* at 1004 n. 15.

of fees poses no threat to Section 1988, 131 U. Penn. L. Rev. at 815. Thus, this Court should permit simultaneous negotiation where plaintiff offers a waiver of fees.[5]

Similarly, a defendant's offer of a lump sum settlement should be allowed. The District of Columbia Legal Ethics Committee ruled that a defendant "may offer a single sum in settlement of the claims against defendant for both damages and attorneys' fees." District of Columbia Bar Legal Ethics Committee, Opinion No. 147, *reprinted* in 113 The Daily Washington Law Reporter 389 (1985). *C.f.* Draft *Manual for Complex Litigation* § 23.2.4 (2d ed. 1985). Even though it did not discuss class actions in particular, the District of Columbia Bar Committee explained that it:

> is not prepared to find that offers of a single sum by a defendant in settlement of Title VII or other similar litigation is unethical. *Society's interest in encouraging disposition of these and other cases through compromise, and a defendant's legitimate interest in defining his liability by settlement in lieu of trial, both require that*

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[5] In his dissent in *Moore*, Circuit Judge Wright seeks to illustrate the "illusory nature" of the distinction between "plaintiff-suggested and defendant-coerced waiver," noting that the District of Columbia Circuit "should hold that simultaneous negotiation of fees and merits is unacceptable, unless unusual circumstances justify such negotiation." *Moore*, 762 F.2d at 1114, 1118. Senior Circuit Judge MacKinnon properly termed such a contention "paternalistic." *Id.* at 1104 n. 15. Judge Toruella similarly noted that allowing the waiver of constitutional rights but disallowing the waiver of fees by an attorney *per se* if negotiated along with the merits constitutes an "excess in paternalism." *Lazar*, 757 F.2d at 439 (concurring opinion).

> *this type of offer should be encouraged, not hindered.* (emphasis supplied).

The Committee noted that plaintiff's attorney must make full disclosure of any conflict the offer creates. This lump sum offer, both well intentioned and encouraged by settlement policy, would be prohibited under the Ninth Circuit's rule. This Court, therefore, should not allow such a rule to stand.

Other situations involving simultaneous negotiation should also be permitted. For example, a carefully drafted retainer agreement between the class and attorney, which contemplates settlement contingencies or vests the statutory fee recovery in the client, should be allowed, even encouraged. Such an agreement is important because it would disclose the attorney's interest in the outcome of the case and memorialize the intentions of the parties. Calhoun, 55 U. Colo. L. Rev. at 353. Senior Circuit Judge MacKinnon in *Moore* noted that under this method, "the attorney and client would no longer have the independent claims for fees which create the conflicts of interest in simultaneous negotiations." *Moore*, 762 F.2d at 1105 n.17; *See, e.g., Brown v. General Motors Corp.*, 722 F.2d 1009, 1011 (2d Cir. 1983). Of course, plaintiff can always move for a court conference to discuss any dilemma involving simultaneous negotiation under Federal Rules of Civil Procedure 16 or 23. *See* Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees are Authorized*, 14 Clearinghouse Rev. 515, 520-21 (1980).

As a corollary to the carefully drafted retainer agreement, an attorney facing such a dilemma may obtain written consent from all parties, including the members of the class, and exercise independent

professional judgment for the class in settling the claim on the merits. In this situation, it is important that the attorney make an offer that is as informed and intelligent as possible. *See generally* Advisory Opinion No. 39, State Disciplinary Board of the State Bar of Georgia (July 20, 1984).[6]

Granted, in the instant case plaintiff would not have been able to draft a retainer agreement or obtain written consent of the class once simultaneous negotiations began. As explained fully later, however, it is incumbent upon the attorney in such a case first, to prepare for such a dilemma, and second, to present the dilemma to the district judge either with a motion under the Federal Rules of Civil Procedure, or during settlement approval. Plaintiff has an ethical duty concomitant with that of defendant not to harbor a "secret plan to rescind" the agreement after the court's acceptance. *Lazar*, 757 F.2d at 438.

The above examples are not exhaustive, but it is abundantly clear that it is unreasonable to adopt a blanket rule when a case-by-case determination by the district court would encompass all such contingencies. In fact, a subcommittee of the District of Columbia Legal Ethics Committee decided to adopt

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[6] Advisory Opinion No. 39 of the State Disciplinary Board of the State Bar of Georgia declined to adopt Formal Opinion 80-94 of the New York City Bar Ass'n Comm. on Professional and Judicial Ethics, which found it unethical for defense counsel to attempt to negotiate the fee award simultaneously with negotiation of the merits. The Disciplinary Board of the Georgia Bar instead relied upon the dissent in Formal Opinion 82-80 of the New York City Bar, which cited with approval this Court's reasoning in *White*, 455 U.S. 445. The dissent in Formal Opinion 82-80 rejected the "strained and doubtful construction" of the majority, stressing a defendant's need to know the total liability before settlement.

no rule, permitting a judge to decide each case on its own merits. The Committee properly recognized that the purpose of a defendant's offer proposing fee waiver during simultaneous negotiations is not to create an attorney-client conflict or to punish or deter a plaintiff's attorney from taking fee-shifting cases. Rather, defendant is seeking to limit total exposure. The subcommittee concluded:

> The key in these situations is whether the defendant's offer is reasonable in light of all of the circumstances, including the chances of success on the merits and the risk of possible exposure in damages and attorneys fees. And in making such determinations, the legitimate interest of the fee shifting provisions must be balanced against the legitimate interest of the defendant, whether a governmental agency or private party, in making an offer which will fix liability with considerable certainty. This balancing approach applies regardless of whether the issue is phrased in terms of the right of the defendant to make a lump sum settlement offer, or the right to refuse to pay fees to the plaintiff's attorney while providing some measure of relief to the client. *In both situations, the inquiry is the same and can be decided only on a case by case basis*, assessing the reasonableness of the defendant's conduct.

Final Subcommittee Report of the Committee on Attorneys Fees, *reprinted in* Bar Report, Aug./Sept. 1984 at 6 (April 11, 1984) (emphasis supplied).

In addition to preventing many valid instances of simultaneous negotiation, the overbroad rule adopted by the Ninth Circuit creates a presumption that simultaneous negotiation is improper, which defendant impliedly must rebut by showing "unusual circumstances." This rule is both unrealistic and

improper. Disciplinary Rule 5-101(A) states that a lawyer shall not accept employment if his professional judgment may be affected by his financial or personal interests. American Bar Association, *Model Code of Professional Responsibility*, as amended. Model Rule 1.2 (a) indicates that a lawyer shall abide by the client's decision whether to accept an offer of settlement. American Bar Association, *Model Rules of Professional Conduct*. Plaintiff should have the burden of proof to show why it did not prepare a retainer agreement, move the court to consider the issue under the Federal Rules of Civil Procedure, or communicate the dilemma when presenting the the settlement to the judge. *See* G. Hazard, Jr. and W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* at 22 (1985) (the lawyer has a duty to communicate an offer of settlement to the client even if the lawyer believes he is acting in the client's best interest in remaining silent).

In fact, the most important avenue of relief has been all but overlooked by the Ninth Circuit: the Rule 23(e) hearing. Rule 23(e) of the Federal Rules of Civil Procedure allows the district court wide discretion to ensure that all aspects of the settlement proposal are fair to the parties, including the class. The rule states that "[a] class action shall not be dismissed or compromised without the approval of the court." *See C.* Wright & A. Miller, *Federal Practice and Procedure* § 1797 (1972). Rule 23, as explained by the court in *Moore*, "places the determination properly within the sound discretion of the trial judge who can be sensitive to the dynamics of the situation." The trial judge can consider, among other relevant factors, the strength of plaintiff's case, the complexity and expense of further litigation, as well

as the amount of opposition to the settlement. *Manual for Complex Litigation* § 1.46 (1982). Even the critics of simultaneous negotiation allay the concerns expressed by plaintiff in the instant case by admitting that the court has wide discretion to protect the class. *See* Levin, 14 Clearinghouse Rev. at 521. In fact, one court has described the role of the district judge as "overseer" of the unnamed passive members of the class. *In Re Armored Car Antitrust Litigation*, 472 F.Supp. 1357, 1369 (N.D. Ga. 1979), *modified on other grounds*, 645 F.2d 488 (5th Cir. 1981).

Thus, the rule adopted by the Ninth Circuit both prevents simultaneous negotiation when it should be allowed, and improperly creates a presumption that negotiations are unethical when, in fact, plaintiff should have prepared for the dilemma. This Court should respect the role of the district court in approving settlements on a case-by-case basis and reverse the Ninth Circuit's overbroad rule.

C. The Court Below Erred When it did not Defer to the District Court's Approval of the Settlement, Since Such Approval did not Constitute an Abuse of the District Court's Discretion

In adopting the rule that simultaneous negotiations are presumptively unethical, the court below noted that the district court should be allowed to consider whether "unusual circumstances" warrant an exception to the *per se* rule articulated in *Prandini. Jeff D.*, 743 F.2d at 652. The court refused to give the district judge deference, however, instead adopting a theory which would reverse a district judge's determination unless, for example, the Justice Department participates as intervenor representing the public interest. *Id.* This reversal clearly was

wrong. A district court's approval of a proposed consent decree should be reversed only if its approval was an abuse of discretion. *See Mendoza v. United States*, 623 F.2d 1338, 1348 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. City of Miami*, 664 F.2d 435, 442 (5th Cir. 1981); *Cotton*, 559 F.2d at 1331. In *United States v. City of Alexandria*, 614 F.2d 1358, 1361 (5th Cir. 1980), the Fifth Circuit stated that in reviewing consent decrees, "the degree of appellate scrutiny must depend on a variety of factors, such as the familiarity of the trial court with the lawsuit, the stage of the proceeding at which the settlement is approved, and the types of issues involved."

In the instant case, the district court had devoted substantial time and effort to a consideration of the issues involved in the settlement, and had specifically considered the ethical dilemma of the negotiations. Under these circumstances, the approval of the consent decree can be overturned only upon a clear showing of abuse of the trial court's discretion. *Miller v. Republic National Life Insurance Co.*, 559 F.2d 426, 428-29 (5th Cir. 1977). The district court did not abuse its discretion in approving the settlement and this Court should, therefore, reverse the judgment of the Ninth Circuit.

II. IF THIS COURT HOLDS THAT SIMULTANEOUS NEGOTIATION WAS IMPROPER IN THE INSTANT CASE, THE PARTIES SHOULD BE ALLOWED TO RENEGOTIATE OR PROCEED TO TRIAL ON THE MERITS IF UNABLE TO REACH AGREEMENT

As an alternative to the argument that the decision below must be reversed, this Court should not simply affirm the court of appeals' judgment. Rather, if this Court holds that the settlement agreement approved

by the district court was improper because it was the product of simultaneous negotiation, it is submitted that this Court should remand the issue for the parties to renegotiate the substantive portions of the decree, should they so desire, or to proceed to trial on the merits if they are unable to reach agreement.

The court below essentially holds that a plaintiff's waiver of the fee and cost provision of a settlement or consent decree can be modified by the court to permit a fee award. This rule would result in the alteration of a material part of the settlement agreement which was a condition to defendant's acceptance of the agreement. Such an alteration further would undermine the finality of the settlement process, and would have the effect of imposing upon a party terms that are materially different from those agreed upon. In addition, this Court should not adopt a rule that would allow a court of appeals to impose unilaterally terms that have been rejected by one or both of the parties.

This Court, in *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), emphasized that consent decrees normally embody a compromise, and that "the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." In the instant case, it is clear that as a condition to the agreement to provide certain specified relief on the merits, plaintiff agreed to the "compromise" of waiving any claims for fees and costs. As this Court noted in *Armour & Co.*, the conditions on which that waiver was given must be respected. *Id.*

It is well established that a court cannot unilaterally alter a negotiated element of a consent decree. *See Plummer v. Chemical Bank*, 668 F.2d 654, 655 n.1 (2d Cir. 1982); *In Re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1125 n.24 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979); *Pettway*, 576 F.2d at 1172; *Cotton*, 559 F.2d at 1331; *Alliance To End Repression v. City of Chicago*, 561 F. Supp. 537, 548 (N.D. Ill. 1982); *Armstrong v. Board of School Directors*, 471 F. Supp. 800, 804 (E.D. Wis. 1979), *aff'd*, 616 F.2d 305 (7th Cir. 1980). As discussed above, the duty of the court of appeals is to ascertain whether the trial judge clearly abused his discretion in approving the settlement. *Mendoza*, 623 F.2d at 1348; *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The court of appeals must accord great weight to the trial judge's views. *Mendoza*, 623 F.2d at 1348. More importantly, the court of appeals is not free to delete, modify or substitute certain provisions of the settlement, but rather the settlement must stand or fall as a whole. *Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976); *Allegheny-Ludlum Industries, Inc., supra.*

The Ninth Circuit did not accord great weight to the trial judge's views in altering the settlement agreement. Indeed, the court of appeals did not respect the purpose of the parties when adding a fee provision. Thus, the Ninth Circuit's reversal of the settlement agreement and a remand for a determination of attorney's fees runs contrary to this well-established line of cases and should not be affirmed by this Court. Rather, if this Court finds that the simultaneous negotiation in the instant case was

improper, the parties should be permitted to achieve a compromise through renegotiation.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court of appeals should be reversed. As an alternative, it is submitted that the judgment of the court of appeals should be remanded to allow the parties to renegotiate the agreement or proceed to trial if they cannot arrive at a satisfactory resolution of the case.

Respectfully submitted,

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No. 84-1288

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

JOHN V. EVANS, et al.,
Petitioners,

v.

JEFF D., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, PUERTO RICO, GUAM, AND THE VIRGIN ISLANDS OF THE UNITED STATES

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	9
ARGUMENT	13
I. THE RULING BELOW IS INCONSISTENT WITH THE CIVIL RIGHTS ATTORNEY'S FEES ACT.	13
A. Section 1988 Was Not Intended By Congress To Preclude Simultaneous Negotiation Of Fees And Substantive Relief.	13
B. Some Tension Between Plaintiffs' Interests And Those Of Their Counsel Is Inherent In The System Congress Created.	24
C. The Effect Of The Ninth Circuit's Rule Is To Deter Settlement Of Civil Rights Cases, Contrary To Congressional Policy, The Interests of Plaintiffs, And Sound Judicial Administration.	28

Page

II. LAWYERS' ETHICAL OBLIGATIONS DO NOT PRECLUDE THE SIMULTANEOUS NEGOTIATION AND SETTLEMENT OF ATTORNEY'S FEES WITH THE MERITS OF A CLASS ACTION. 35

A. Standards Governing Professional Ethics Do Not Prohibit The Simultaneous Negotiation Or Waiver Of Attorney's Fees. 37

B. If Attorneys For Plaintiffs Discuss And Set Out In Writing Their Fee Agreement As They Should, There Will Be No Ethical Problems When Subsequent Offers Are Made. 45

C. A Rule Prohibiting Simultaneous Negotiation Impedes Defense Counsel's Obligation To His Client. 51

III. ADEQUATE MECHANISMS EXIST TO ENSURE THAT A SETTLEMENT CONTAINING A FEE PROVISION HAS BEEN PROPERLY NEGOTIATED AND IS FAIR AND REASONABLE. 54

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. Reed,
462 F. Supp. 496
(N.D. Miss. 1978) 7n.

Brown v. General Motors Corp.,
722 F.2d 1009
(2d Cir. 1983) 23

Burks v. Lasker,
441 U.S. 471 (1979) 55

Chesny v. Marek,
720 F.2d 474
(7th Cir. 1983) 47

Delta Airlines, Inc. v. August,
450 U.S. 346 (1981) 33, 35

Jeff D. v. Evans,
743 F.2d 648
(9th Cir. 1984) 16n., 27n., 36

Franks v. Kroger Co.,
649 F.2d 1216
(6th Cir. 1981) 57n.

Hensley v. Eckerhart,
461 U.S. 424 (1983) 32, 34n.

Johnson v. Zerbst,
304 U.S. 458 (1938) 17n.

Page

Lazar v. Pierce,
757 F.2d 435
(1st Cir. 1985) 17n., 19n., 20, 25, 53

Maher v. Gagne,
448 U.S. 122 (1980) 16n., 17

Malchman v. Davis,
761 F.2d 893
(2nd Cir. 1985) 55

Marek v. Chesney,
No. 83-1437, slip op.
(June 27, 1985) 20, 21, 25, 26, 28, 31, 34, 40, 47, 52

Moore v. National Association of Securities Dealers,
762 F.2d 1093
(D.C. Cir. 1985) 23, 29, 44, 50, 57n., 58n.

N.A.A.C.P. v. Wilmington Medical Center, Inc.,
689 F.2d 1161
(3d Cir. 1982)
cert. denied,
460 U.S. 1052 (1983) 7n.

Officers for Justice v. Civil Service Commission,
688 F.2d 615
(9th Cir. 1982)
cert. denied,
459 U.S. 1217 (1983) 55

Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,
105 S. Ct. 658 (1985) 14

	Page
Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)	29n.
Soskel v. Texaco, Inc., 94 F.R.D. 201 (S.D. N.Y. 1982)	57n.
Tornabene v. General Development Corp., 88 F.R.D. 53 (E.D. N.Y. 1980)	57n.
Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), cert. denied 104 S. Ct. 77 (1983)	56
White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982)	24, 27, 29 39, 52
Statutes	
42 U.S.C. § 1988	10, 14, 15, 18 22, 32, 33, 34
Legislative Materials	
H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976)	34n.

Page

S. Rep. No. 1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad. News 5908. 16n., 34n.

The Legal Fee Equity Act: Hearing on S. 2802 Before The Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess., (1984) 3n.

122 Cong. Rec. 33,314 20n.

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Miscellaneous

Federal Rules of Civil Procedure
Rule 23(e) 54, 58
Rule 68 40

Model Code of Professional Responsibility 37n., 40, 42
Canon 5 37
Canon 6 27n.
Canon 7 27n., 51n.
DR 1-102(A)(5) 41n.
DR 2-106(C) 46n.
DR 5-101(A) 27n., 51n.
DR 5-103(A) 23n.
DR 5-103(A)(2) 43n.
DR 5-105(A) 43
EC 5-1 38
EC 2-19 48n.

Page

EC 2-20 46n.
EC 7-7 52
EC 7-8 52

Model Rules of Professional
Conduct 37n., 40, 41n., 42, 47
Rule 1.1 51n.
Rule 1.2(a) 52
Rule 1.5 41n.
Rule 1.5(b) 48
Rule 1.5(c) 43n., 46n., 48
Rule 1.7 38
Rule 1.7(b) 27n., 42
Rule 1.8(j) 23n.
Rule 2.1 37

Canons of Professional
Ethics (1908) 37n.

Calhoun, Attorney-Client Conflicts of
Interest and the Concept of
Non-negotiable Fee Awards
Under 42 U.S.C. § 1988,
55 U. Colo. L. Rev.
341 (1984) 30n.

Comment, Settlement Offers Conditioned
Upon Waiver of Attorneys' Fees:
Policy, Legal, and Ethical
Considerations,
131 U. Pa. L. Rev.
793 (1983) 29n.

	Page
New York City Bar Association Opinion, 80-94, 36 Rec. A.B. City N.Y. 507 (1981)	41n.
C. Wright & A. Miller, Federal Practice and Procedure, § 1797 (1972)	55n.

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Respondents.

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BRIEF OF AMICI CURIAE,
In Support Of Petitioners

INTEREST OF AMICI CURIAE

This case presents the important question whether federal law prohibits the parties to a civil rights action from negotiating a settlement of the defen-

dant's liability for statutorily authorized attorney's fees at the time the parties negotiate the settlement of other forms of relief.

The States have a substantial interest in the resolution of this issue. The decision of the court below, holding it improper as a matter of federal law for defendants in virtually any civil rights class action to negotiate a settlement on the merits simultaneously with a settlement of attorney's fees, will substantially impede the settlement of all but the most compelling and meritorious of cases against governmental entities. Accordingly, the decision may well result in an unnecessary increase in costs to the States and in the workload of the federal courts without a

concomitant increase in benefits to civil rights plaintiffs.[1/]

The States, through their elected and appointed officials, are common targets for civil rights lawsuits, particularly class actions. The States regularly seek to settle such cases for a variety of reasons, some shared by all civil litigants, some unique to govern-

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1/ Under the rule created by the court below, even if the parties manage to settle the merits of the lawsuit, the fee claim remains to be litigated. Because of the high degree of uncertainty and inconsistency in the application of attorney's fees law, these claims have proven highly resistant to settlement, thus requiring further judicial involvement. See generally The Legal Fee Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 234-356 (1984) (statements and materials submitted by Francis X. Bellotti, Attorney General of Massachusetts, Steve Clark, Attorney General of Arkansas, and David L. Wilkinson, Attorney General of Utah).

mental defendants. Like all pragmatic defendants, state defendants have strong incentives to compromise cases in which there is a high degree of certainty that plaintiffs will prevail. Perhaps more so than private defendants, governmental defendants will ordinarily seek to settle a separate class of cases whose legal merits may be more doubtful but whose results do not conflict with the defendant's program objectives. In such cases the devotion of expensive litigation resources may, because of extensive discovery and lengthy trial preparation, significantly distract officials from the administration of essential state programs, including those serving the plaintiffs. Hence litigation may be seen as detrimental to both the government and the public it serves.

In the first class of cases, the defendant naturally will seek to minimize his fee liability, but will almost certainly not be in a position to insist on a total fee waiver; the risk of preventing settlement and incurring even greater fee liability after full litigation simply does not justify such a bargaining position. In the second class of cases, cost-benefit analysis on a case-by-case basis will determine the amount of fees that can be offered in settlement. As the potential attorney's fee awards in these cases can and often do far exceed the cost of the merits settlements, the prospect of settlement is highly sensitive to the ability of the defendant to ascertain in advance the total liability. Only then can the defendant make a cost-benefit assessment of the entire settlement package.

Perhaps the most unfortunate impact of the rule adopted below will be on a third class of litigation that state defendants frequently encounter. These are cases in which the government has strong, even dispositive, legal defenses, but because of considerations of public policy, sound administration, or compassion, the defending state official desires to give the plaintiffs what they ask for. However, to agree to such gratuitous relief is to incur liability for fees. If the decision to settle is made at the outset of the litigation, the amount of fees incurred will likely--though not necessarily--be sufficiently modest to permit settlement. It often happens, however, that changes in policy occur through the normal political process after years of litigation have been

invested in a case and the amount of fees thus incurred will have risen to the six- or seven-figure level. Most state budgets simply do not allow the "luxury" of diverting tax dollars from pressing public needs to the payment of lawyers whose clients are unlikely to prevail but for settlement.[2/] This is not to say that in all such cases relief will be held hostage to a fee waiver. However, it

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2/ If the government acts unilaterally to change policy, improve services, or upgrade institutions as requested in the plaintiffs' complaint, it nonetheless runs the substantial risk of being found liable for fees because the plaintiffs will have obtained some of the relief sought by the complaint. See, e.g., Armstrong v. Reed, 462 F. Supp. 496, 498-99 (N.D. Miss. 1978). At the very least, it will have created the occasion for another lawsuit to determine whether the complaint was a material factor in securing the improvements. See, e.g., N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d 1161, 1169 (3d Cir. 1982) cert. denied 460 U.S. 1052 (1983).

cannot be denied that settlement of many cases is impossible without a waiver or a substantial reduction of the fee liability. The rule established below will force the removal of the fee issue from the bargaining table where it may be an essential ingredient to a successful settlement. The amici, both in their institutional capacities and as entities committed to the protection of their citizens, will suffer the consequences.

For these reasons, the amici join the Idaho petitioners in urging reversal of the decision below. The amici urge this Court to decline to adopt any per se rule governing settlement in a civil rights case. Rather, the parties should be free to construct settlements that address all of their concerns without predetermination by judge-made rules.

In class actions, fairness is assured by the district court's Rule 23(e) review the parties' negotiated settlements. This approach, long-accepted in other types of cases, relies on the ability of the parties to negotiate settlements consistent with the law and with attorneys' ethical obligations to their clients. Permitting the same dynamics of negotiation that govern most civil cases to govern settlements of civil rights cases will ensure a reasonable compromise of civil rights claims, including claims for attorney's fees.

SUMMARY OF ARGUMENT

I. The rule against simultaneous negotiation of substantive relief and attorney's fees announced by the court below purports to give effect to The

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Yet the rule finds no basis in either the language or history of § 1988. Moreover, the rule reflects a paternalistic policy orientation that is inconsistent with that of the Congress and conflicts with the admonitions of this Court concerning the importance of voluntary settlement of cases, including fees, to the overall administration of justice. Voluntary settlement of cases will be greatly diminished if defendants are unable to ascertain their total liability or if defendants are forced to make a deflated merits offer to cushion against a subsequent fee award of an unknown amount. A rule that impedes settlements is detrimental to the public, the defendants,

and most important, to civil rights plaintiffs.

II. A blanket rule precluding the simultaneous negotiation of the merits of a case and the fees merely because of a possibility of diverging interests between the class members and their lawyer, has no basis in any commonly accepted formulation of professional responsibility. As long as a lawyer represents his client competently and zealously and exercises independent judgment on behalf of his client, ethical problems need not arise. Moreover, by setting out in a fee agreement at the beginning of the representation how the lawyer will deal with an offer that contains a fee provision, potential ethical problems will be avoided.

By attempting to eliminate a potential ethical problem for plaintiffs' counsel, the court below created one for defense counsel. A bifurcated approach to settlement prevents defense counsel from adequately advising his client as to the risks and benefits of a settlement.

III. A prophylatic rule prohibiting simultaneous negotiation of fees and the merits of a case is not necessary. The usual dynamics of negotiation, which takes into consideration the strengths and weaknesses of each side's case, notice to the class prior to approval of a settlement, and the required district court approval for a class action settlement, is all that is necessary to ensure that a settlement has been negotiated in good faith and represents a fair compro-

mise of the parties' claims, including a claim for fees. These existing mechanisms are sufficient to meet the concerns of both the class members and their counsel.

ARGUMENT

I. THE RULING BELOW IS INCONSISTENT WITH THE CIVIL RIGHTS ATTORNEY'S FEES ACT.

A. Section 1988 Was Not Intended by Congress To Preclude Simultaneous Negotiation Of Fees And Substantive Relief.

The Court of Appeals' rule against simultaneous negotiation of fees and merits rests in large part on its view that such a practice conflicts with the intent of Congress as embodied in § 1988. Yet the court divines that intent from

sources other than the primary expression of congressional intent: the plain language of the statute itself. Park 'N Fly, Inc. v. Dollar Park And Fly, Inc., 105 S. Ct. 658, 662 (1985).

It was necessary for the court to bypass this primary source in order to reach its conclusion simply because § 1988[3/] contains no language even arguably prohibiting simultaneous negotiation. Nowhere in the express language of the statute is there any discussion,

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3/ Section 1988 states in relevant part,

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

mention, or clue regarding congressional policy on simultaneous negotiation of fees and merits or waiver of fees. Nor is there any indication in the legislative history of § 1988, which contains an otherwise extensive discussion of congressional policy on attorney's fees in civil rights cases, that Congress thought it appropriate to discourage, much less prohibit, simultaneous negotiations or voluntary waiver of fees.

In the absence of any direct supporting evidence in the legislative materials concerning simultaneous negotiation of fees, the court below based its analysis of congressional intent on a series of observations: that Congress authorized the award of fees to enable "aggrieved

parties . . . to advance the public interest by invoking the injunctive powers of the Federal courts";[4] that, absent special circumstances, prevailing parties should ordinarily recover fees, id., and finally that plaintiffs who obtain favorable settlements may be said to have prevailed and thus are eligible for fees.[5] While these observations establish that fees should ordinarily be awarded to a plaintiff who obtains a favorable settlement on the merits, as

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4/ Jeff D. v. Evans, 743 F.2d 648, 651 (9th Cir. 1984) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910).

5/ Id. (citing Maher v. Gagne, 448 U.S. 122, 129 (1980)).

in Maher v. Gagne,[6] they do not lead to the conclusion that congressional policy precludes simultaneous negotiation of all claims for relief, including negotiations leading to the compromise or waiver of fees. If fundamental constitutional rights can be knowingly be waived,[7] "it would be an excess of paternalism" to conclude that Congress intended to prevent waivers of attorney's fees, particularly where no textual expression of such an intent exists.[8]

6/ In Maher, "[t]he parties informally agreed that the question whether respondent was entitled to recover attorney's fees would be submitted to the District Court after entry of the consent decree." Id. at 126.

7/ E.g., Johnson v. Zerbst, 304 U.S. 458 (1938).

8/ Lazar v. Pierce, 757 F.2d 435, 439 (1st Cir. 1985) (Torruella, J., concurring).

While the statute and its history yield no basis for concluding that Congress opposed simultaneous negotiations or voluntary waivers, they do reveal that Congress did not think it was establishing a mandatory duty to award fees or even an unqualified right to recover fees. Section 1988 provides simply that the district court, "in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee . . . ." Even in light of the strong presumption in favor of fee awards, it is difficult to imagine circumstances that would better support a discretionary denial of fees than a knowing and voluntary waiver, tendered in exchange for substantive relief greater than what would likely have been obtained through continued litiga-

tion.[9] To reverse the District Court's ruling in these circumstances and impose a virtually universal rule prohibiting simultaneous negotiation is to rewrite the statute, effectively deleting the discretion that Congress gave to the district court.[10]

As this Court recently observed, Congress authorized fee awards to enable

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9/ Even in a case where the legal liability of certain defendants was much more probable than here, the First Circuit not only upheld the discretionary denial of fees, but questioned the propriety of plaintiff counsel's conduct in bargaining for substantive relief in return for a fee waiver, only to renounce the waiver while seeking to retain the benefit of the bargain. Lazar v. Pierce, 757 F.2d at 437-439.

10/ Of course, even if one views § 1988 as creating an absolute entitlement to fees, there is no rule of law that prohibits settlement or waiver of claims to statutory entitlements.

an aggrieved party with a meritorious civil rights claim to gain access to the judicial process; it did not intend to create an entitlement program for lawyers. Marek v. Chesny, No. 83-1437, slip op. at 8, 9 (June 27, 1985).[11/] The distinction is critical because, if the prospect of a fee award "belongs" to the client, it may be used as a bargaining chip in negotiations in the client's behalf just as surely as statutorily authorized declaratory, injunctive, and damages relief may be waived, reduced, expanded, or deferred as the parties search for a mutually acceptable result. Lazar

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11/ The proponents of § 1988 repeatedly emphasized that it was not intended as an aid program for lawyers. See, e.g., 122 Cong. Rec. 33,314 (remarks of Sen. Kennedy); 35,127 (remarks of Rep. Jordan) ("This is not a food-stamp bill for lawyers.").

v. Pierce, 757 F.2d at 440 (Torruella, J., concurring). Under this view of § 1988, the potential availability of a fee award helps to achieve the overriding congressional purpose--to enable aggrieved persons to obtain substantive relief--as effectively as does an actual award after successful litigation, except that a negotiated settlement affords relief sooner and with greater certainty. Marek v. Chesny, slip op. at 8.[12/] The

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12/ This is particularly true where a plaintiff "prevails" as a result of a defendant's gratuitous willingness to consent to a judgment that would not have been legally compelled had the suit been fully litigated. As this case illustrates, governmental defendants often settle cases even where strict legal liability is doubtful in order to serve public policy objectives. Assuming that such a practice is desirable, the rule established by the court below will inevitably make such settlements less attractive, as each such agreement will

(footnote continued)

rule created by the court below, by greatly diminishing the incentives to settlement, vitiates an important mechanism for redressing the grievances of civil rights plaintiffs and, to that extent, undermines both the ultimate purpose of § 1988 and the broader public policy favoring settlement of litigation.

The true congressional policy finds textual expression in the fact that § 1988 authorizes an award of fees only to the "prevailing party," not to his or her counsel, whose right to such fees is one of subrogation to the client's statutory entitlement. As the District of

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(footnote continued)

carry with it an attorney's fees price tag of indeterminate amount that must be paid from the same tax dollars available to serve the needs of the plaintiff class.

Columbia Circuit has observed, "[t]his appears the more reasonable approach, and is one which would greatly reduce . . . alleged conflicts of interest." Moore v. National Ass'n of Securities Dealers, 762 F.2d 1093, 1099 n. 10 (D.C. Cir. 1985) (Title VII class action) (citing Brown v. General Motors Corp., 722 F.2d 1009, 1011 (2d Cir. 1983)).[13/]

13/ Implicit in the reasoning of the court below is that § 1988 creates a property interest belonging to the lawyer, not the party; hence, the alleged conflict of interest. Under this view, Congress has given to plaintiff's counsel precisely what the Code of Professional Responsibility counsels against: a proprietary interest in the cause of action or subject matter of litigation conducted for a client. Model Code of Professional Responsibility DR 5-103(A) (1979); accord Model Rules of Professional Conduct Rule 1.8(j) (1983). Had Congress actually intended to preempt a disciplinary rule in effect in virtually every American jurisdiction, one would expect some evidence of such an intent in the legislative materials. Yet, there is none.

B. Some Tension Between Plaintiffs' Interests And Those Of Their Counsel Is Inherent In The System Congress Created.

The alleged ethical dilemma faced by plaintiffs' counsel is not a function of the civil rights nature of this lawsuit, nor is it the product of a negotiation tactic unique to public defendants. Rather, it springs from the dynamics of fee-shifting itself. As this Court has observed, whenever a party may be liable for fees as well as for other relief, he will have "good reason to demand to know his total liability" before entering into a negotiated settlement. White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 454 n. 15 (1982). Indeed, defendant's attorney "owes a positive duty to his client to reduce his liability and his exposure to recovery, to the

limits of the attorney's ability." Lazar v. Pierce, 757 F.2d at 439 (Torruella, J., concurring). This duty finds expression in efforts to negotiate fee liability along with substantive relief in any civil rights lawsuit subject to a fee-shifting statute. Unless Congress intended to treat civil rights cases differently from other civil cases insofar as settlement is concerned, a proposition this Court rejected in Marek v. Chesny, slip op. at 8, there is no justification for a prophylactic rule shielding plaintiffs' counsel from the choices necessitated by statutory fee-shifting.

To be sure, plaintiffs' counsel may be required to "think very hard" about the strength of the case and the choice

between continued litigation and waiver or reduction of the fee claim to induce settlement. Lawyers often do and always should think very hard before accepting any element of a settlement that represents less than what might reasonably be expected from vigorous litigation. But the need to make hard choices does not counter the congressional policies underlying § 1988. Marek v. Chesny, slip op. at 8-9. In any case, to the extent any "ethical dilemma" may be occasioned by simultaneous negotiation,[14/] it springs

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14/ One may question whether any true "ethical dilemma" is posed by simultaneous negotiation or offers of settlement conditioned on waived or reduced fees. Counsel in such a situation does not potentially violate one ethical precept in order to comply with another. Here, only one ethical obligation of plain-

(footnote continued)

directly from the operation of the fee-shifting statute and is not beyond the capacity of ethical counsel to resolve. White v. New Hampshire Dept. of Employment Security, 455 U.S. at 454 n. 15.

(footnote continued)

tiffs' counsel is implicated: the duty to serve the client's interests competently and zealously. Model Code of Professional Responsibility Canon 6, 7.

Instead, the discomfort experienced by plaintiffs' counsel in this case stems actually from the temptation to act inconsistently with the client's interests because of instruction from counsel's law firm employer not to waive fees. 743 F.2d at 650. The law firm, apparently viewing the prospect of a fee award as its entitlement, was at least as responsible for creating any conflict as was defendant's offer. As discussed below at pp. 45-50, these problems are easily avoided by early discussions and agreements with the client as well as the exercise of independent legal judgment on behalf of the client at all times. See Model Code DR 5-101(A); Model Rule 1.7(b).

C. The Effect Of The Ninth Circuit's Rule Is To Deter Settlement Of Civil Rights Cases, Contrary To Congressional Policy, The Interests of Plaintiffs, And Sound Judicial Administration.

If the rule devised by the court below is adopted, a defendant in a civil rights lawsuit who is inclined to settle will not be able to ascertain his total liability. Such a defendant will thus be far less disposed to compromise the case, because it would leave a significant aspect of liability unresolved.

No extended defense of this proposition is necessary. This and other courts have recognized that unless a defendant is able to ascertain his total liability from a proposed settlement, he will understandably be reluctant to agree to it. E.g., Marek v. Chesny, slip op. at

4; Moore v. National Ass'n of Securities Dealers, 762 F.2d at 1104-05 and n. 14. Partly for this reason, the Court in White v. New Hampshire Dept. of Employment Security declined to adopt a rule identical to that adopted by the court below in this case. 455 U.S. at 453-454 n. 15.[15/]

15/ Perhaps more tellingly, it is reported that notwithstanding the mandatory bifurcated negotiation rule in Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977), some trial judges in the Third Circuit encourage the parties engaged in settlement talks to discuss data sufficient to allow the defendant to make an educated guess as to fees liablity. The trial judges believe that defendants are not likely to settle cases unless they know the full extent of their liability. Comment, Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations, 131 U. Pa. L. Rev. 793, 804 n. 90 (1983). Whether those educated guesses are ultimately accurate enough to satisfy defendants is not disclosed.

The rule may also deter settlements by deflating the value of whatever merits offers defendants do make, in order to provide a cushion against a subsequent fee award of unknown amount.[16/] Since the merits offer may be lower than it might otherwise be, relative to the strength of the plaintiff's case (par-

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16/ As noted by one commentator,

> Negotiation of the merits will proceed on an implicit understanding of what a reasonable fee claim would be, and that understanding will inevitably influence the negotiation. Defendants may provide a cushion for subsequent fee claims when negotiating the merits of a settlement, and plaintiffs' attorneys, cognizant of the defendants' strategy, may not vigorously protest the strategy because the amount of the fee is at stake.

Calhoun, Attorney-Client Conflicts of Interest and the Concept of Non-negotiable Fee Awards Under 42 U.S.C. §1988, 55 U. Colo. L. Rev. 341, 363 (1984).

ticularly if defendant's offer is premised on an overestimation of his fee liability), it is less likely to be accepted in compromise of the merits claim, again forcing the case to trial. Furthermore, to the extent such deflated offers are accepted, it is the civil rights plaintiff who suffers the consequence of the rule.

In sum, adoption of the rule established by the court below can only widen the gulf between the parties as they consider the possibility of compromising a civil rights lawsuit, with the inevitable result that fewer cases will be settled, more cases will be fully litigated, and fewer plaintiffs will receive any substantive relief. Marek v. Chesny, slip op. at 8 (some plaintiffs will re-

ceive relief through settlement where they might have recovered nothing by going to trial).

In addition to deterrence of merits settlements, another effect of the bifurcated negotiation rule is to preserve controversies over fees even if the parties do settle the merits claims. In Hensley v. Eckerhart, 461 U.S. 424 (1983), this Court warned that "a request for attorney's fees should not result in a second major litigation," and further stated that "[i]deally, . . . litigants will settle the amount of a fee." Id. at 437. However, as indicated by the ever-increasing amount of litigation under § 1988 and similar fee-shifting provisions, the ideal is difficult to achieve. Because of the large number of

"wild cards" that enter into the calculation of a "reasonable" attorney's fee, as well as frequent disagreements over the degree to which a plaintiff has "prevailed" and the availability of bonuses, "[a]ttorney's fees . . . are a different breed of cat," largely immune from reliable estimates, even by knowledgeable defense counsel. Delta Air Lines, Inc. v. August, 450 U.S. 346, 379 n. 5 (1981) (Rehnquist, J., dissenting). See also supra note 1. The uncertainty governing fees calculation generates a wide disparity between what plaintiffs' and defendants' counsel believe is "reasonable" under § 1988. The net result is that settlement is stymied, the fees claim is forced to trial, and the federal courts are treated to "one of the least

socially productive types of litigation imaginable."[17/] A rule that not only discourages but prohibits settlement of fee claims with the merits can only ensure the continued generation of such useless litigation.

As § 1988 was intended to vindicate the rights of civil rights plaintiffs not only through litigation but also through settlement,[18/] these anti-settlement effects of the rule adopted below conflict with the intent of Congress. By contrast, as this Court pointed out in Marek v. Chesny, slip op.

17/ Hensley v. Eckerhart, 461 U.S. at 442 (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring in part and dissenting in part).

18/ See S. Rep. No. 1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976).

at 8-9, there is nothing inconsistent with the purpose of the statute in offering to settle simultaneously both the substantive and fee claims. Indeed, to the extent that the parties can successfully employ practices designed to induce and facilitate settlement, they serve not only their own interests but also those of the public. Delta Airlines, Inc. v. August, 450 U.S. at 363 (Powell, J., concurring).

II. LAWYERS' ETHICAL OBLIGATIONS DO NOT PRECLUDE THE SIMULTANEOUS NEGOTIATION AND SETTLEMENT OF ATTORNEY'S FEES WITH THE MERITS OF A CLASS ACTION.

The limitations imposed by the Court of Appeals on the negotiation and settlement of civil rights class actions rest exclusively on "the possibility of diverging interests of the [plaintiffs']

lawyer and the class." 743 F.2d at 652. The mere potential for a conflict of interest, however, does not warrant a blanket federal rule prohibiting the settlement, including waiver, of attorney's fees with the merits of the case for several reasons. First, standards governing professional ethics do not preclude attorneys from negotiating or waiving attorney's fees. Second, a rule prohibiting such settlements may interfere with defense counsel's obligation to adequately represent his client. Finally, adequate mechanisms exist to meet any conflict of interest that may arise during the settlement of attorney's fees with the merits of a federal class action.

A. Standards Governing Professional Ethics Do Not Prohibit The Simultaneous Negotiation Or Waiver Of Attorney's Fees.

One of a lawyer's foremost obligations is to exercise independent judgment in behalf of a client. Model Rules of Professional Conduct Rule 2.1. See also Model Code of Professional Responsibility Canon 5.[19/] In order to exercise that independent judgment a lawyer must not allow his own interest to adversely af-

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19/ Beginning with the Canons of Professional Ethics adopted in 1908, the American Bar Association has continually published standards for professional conduct. In 1970, the often-amended Canons of Professional Ethics were replaced by the Model Code of Professional Responsibility (Model Code). The Model Code consists of three separate but interrelated parts: Canons, Ethical Considerations (EC), and Disciplinary Rules (DR). The American Bar Association's most recent compilation of ethical guidelines is contained in the Model Rules of Professional Conduct adopted in 1983 (Model Rules).

fect his client's interest. Model Rule 1.7; Model Code EC 5-1.

The possibility of diverging interests between counsel for a class and the members of the class does not exist only in those cases where a statutory fee is available. For example, a class action that is settled by the establishment of a common fund out of which an attorney's fee will be paid, positions the interests of the attorney much more directly against those of the class members. Similarly, an attorney who has agreed to represent a class seeking damages on a contingent fee basis may be faced with a potential conflict during the negotiation of a settlement, since contingent fees, like statutory awards, give an attorney

a pecuniary interest in the outcome of the litigation. In short, the potential for a conflict of interest exists in a variety of fee arrangements. But, as long as plaintiffs' counsel exercises independent judgment during the negotiations and does not allow his interest in fees to adversely affect his clients' interest, ethical problems will be avoided.

In White v. New Hampshire Department of Employment Security, supra, the petitioners urged the Court to adopt a rule similar to that fashioned by the Court of Appeals in this case. The Court recognized the ethical issues involved in prejudgment fee negotiations; nevertheless, no limitations were imposed upon the usual negotiation process. 455 U.S.

at 453-454 n.15. More recently, in Marek v. Chesny, supra, the Court rejected the suggestion that settlements in civil rights cases should be treated differently from those in other cases and held that fees are properly included in a Rule 68 offer for judgment in a civil rights action. There is no logical distinction between including the fee issue in settlement discussions in order to induce settlement and including fees in a Rule 68 offer, the purpose of which is, of course, to induce settlement.

Neither the Model Rules nor the Model Code prohibit settlements that include a fee provision or attempt in any way to alter the manner by which cases are ordinarily settled. The drafters of the Model Rules were aware of the contro-

versy over the simultaneous negotiation of fees and merits or settlements conditioned upon the waiver of fees, but nonetheless chose not to include a provision prohibiting such conduct or settlement offers.[20/]

20/ In the "Legal Background" discussion associated with Model Rule 1.5 (Fees), the drafters of the Model Rules acknowledge the New York City Bar Association Opinion 80-94, 36 Rec. A.B. City N.Y. 507 (1981), that prohibits simultaneous settlement of fees and merits in civil rights cases because to do so would violate DR 1-102(A)(5) ("A lawyer shall not engage in conduct that is prejudicial to the administration of justice.")

However, the drafters specify expressly in discussing the scope of the Model Rules that only "the text of each rule is authoritative. . . . The [Legal Background] notes have not been adopted, do not constitute part of the Model Rules and are not intended to affect the application or interpretation of the Rules and Comments." Annotated Model Rules of Professional Conduct (1984) p. 11.

Of course, whether the appropriate governmental entity in any given juris-

(footnote continued)

Moreover, the Model Rules and Model Code recognize that situations arise in which a lawyer's interest may diverge from his client's interest. Yet, lawyers are given considerable leeway to accommodate such divergent interests. Model Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation . . . .

(footnote continued)

diction chooses to adopt a rule barring simultaneous negotiation is a matter that remains within its prerogatives. However, if this Court affirms the decision below, a federal rule of law will have been created, arguably preempting state regulation of bar conduct, at least in cases of the type now before the Court.

See also Model Code DR 5-101(A).[21/] As the White Court recognized, and DR 5-105(A) explicitly provides, ethical counsel can and should find an ethical resolution to potential conflicts with the client.

The ethical concerns raised by the Court of Appeals will be avoided if the usual dynamics of negotiation, coupled with counsel's primary obligation to his client, govern the professional conduct of counsel during the settlement of civil rights cases. In considering a settlement offer that includes either a waiver of fees or an amount less than counsel would otherwise be requesting from the court, plaintiffs' attorney should ex-

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21/ Similarly, contingent fee arrangements are recognized even though such a fee arrangement may create a conflict of interest. Model Rule 1.5(c); Model Code DR 5-103(A)(2).

amine with his clients the strengths and weaknesses of the case just as he would if fees were not in issue. As in the settlement of any issue, plaintiffs may direct their counsel to waive claims upon which they are unlikely to prevail. In a case that is weak on the merits, for example, an attractive offer by the defendant on the merits along with a reduced or waived fee will serve both the clients' and attorneys' interest well. Moore v. National Association of Securities Dealers, 762 F.2d at 1098-99. In any event, where plaintiffs' likelihood of success is strong, plaintiffs' counsel is not ethically bound to accept such an offer but instead is free to reject it and proceed to trial. Id. at 1113 (Wald, J., concurring). As a practical matter,

defense counsel is unlikely to request that plaintiffs waive fees or accept an unreasonably low fee if plaintiffs have a strong case on the merits; defendants are well aware of their potential fee liability should they lose after a lengthy trial on the merits.

B. If Attorneys For Plaintiffs Discuss And Set Out In Writing Their Fee Agreement As They Should, There Will Be No Ethical Problems When Subsequent Settlement Offers Are Made.

The court below discerned a potential ethical dilemma created, in its view, by defendant's settlement conduct; it thus created a prophylactic rule that is directed solely at that conduct. However, if one shifts the analytical focus from the defendant at the time of settlement

to the plaintiffs and their attorney at the time their relationship is established, one finds a far more neutral device to minimize, if not eliminate, the potential ethical difficulties arising from settlement negotiations.

When a civil rights class action is initiated, counsel and the plaintiff representatives[22/] are in no different situation than the parties to an ordinary contingent fee contract.[23/] Plaintiffs who are unable to finance the litigation

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22/ In cases involving minors or legal incompetents, counsel should ordinarily be retained by parents, guardians, or guardians ad litem.

23/ Of course, contingent fee arrangements have long been recognized as an appropriate means of securing legal representation in certain kinds of cases. Model Rule 1.5(c); Model Code DR 2-106(C), EC 2-20.

agree that their attorney may be compensated by a fixed amount or percentage of the recovery in the event the plaintiffs succeed. The fact that there may be a statutory provision allowing for attorney's fees does not affect the fundamental nature of this relationship. See, e.g., Chesny v. Marek, 720 F.2d 474, 478 (7th Cir. 1983), rev'd on other grounds, sub nom. Marek v. Chesny, supra.

Of course, it is rightfully incumbent upon counsel to clarify the fee arrangement as early as possible when legal representation is initiated. The Model Rules strongly encourage counsel to reduce to writing the fee agreement as soon as possible, particularly when it is a contingent fee arrangement:

> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
>
> (c) . . . A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. . . .

Model Rule 1.5(b)-(c).[24/]

Thus, counsel for plaintiffs in civil rights actions should set out in writing

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24/ See also Model Code EC 2-19 (encouraging fully explained and clear fee agreements with clients, particularly clients with little or no experience with legal fees; contingent fee arrangements especially should be in writing).

the understanding they reach with their clients regarding attorney's fees. Such a retainer agreement could directly address the diversity of interests that may arise when the plaintiff is presented with a settlement offer addressing both the merits of the case and attorney's fees. The fee agreement could specify the circumstances, if any, in which a settlement offer which demands reduction or a waiver of attorney's fees would be accepted.25/ Such a retainer agreement would eliminate many, if not all, of the

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25/ In suits for damages, the retainer agreement could also set the fee as a certain percentage of any amount awarded or achieved through settlement with any attorney's fees added into the lump sum, or with any attorney's fees to go to the plaintiffs' attorneys on top of the attorney's fixed share of recovery on the merits.

ethical concerns that face plaintiffs' attorneys when they are presented with settlement offers addressed to both the merits and attorney's fees. See Moore, 762 F.2d at 1112 n. 1 (Wald, J., concurring).

Thus, with no additional burden on the parties or the judicial system, many of the purported ethical problems would be eliminated with the proper utilization of retainer agreements. Instead of pursuing these avenues open to ethical counsel, some attorneys with whom the amici have contact have sought to import an absolute bar to simultaneous negotiation. Such an across-the-board rule, premised merely upon a "possible" conflict, cannot be justified and should be rejected by this Court.

C. A Rule Prohibiting Simultaneous Negotiation Impedes Defense Counsel's Obligation To His Client.

The rule created by the court below, by seeking to insulate plaintiffs' counsel from the possibility of conflicts, seriously impairs defense counsel's ability to provide competent and, therefore, ethical representation to his client.[26/] One of the chief concerns of the parties in any action is whether to settle the case and thereby avoid the time, expense, and uncertainty of a trial. This concern is of particular importance in a civil rights class

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26/ Model Rule 1.1 provides: "A lawyer shall provide competent representation to a client." Similarly, Canon 6 of the Model Code states: "A lawyer should represent a client competently." Canon 7 further states: "A lawyer should represent a client zealously within the bounds of the law."

action because of the time-consuming and costly nature of such trials. The ultimate decision to settle a case rests, of course, with the client. Model Rule 1.2(a); Model Code EC 7-7. A defendant cannot make an informed decision on whether to settle, however, unless his attorney provides him with all the relevant facts necessary for such a decision. Model Code EC 7-8. An essential fact, if not the essential fact, in deciding whether to settle is the defendant's total potential liability, financial and otherwise.

The Court has recognized the defendant's need to know his total exposure to liability upon settlement. White v. New Hampshire, 455 U.S. at 454; Marek v. Chesny, slip op. at 4. If defense counsel is barred from negotiating a fee set-

tlement, he is in no position to advise his client completely as to the relative risks and benefits of settlement and trial. Requiring defense counsel to leave a key element of a civil rights case unsettled and unnegotiated will expose his client to unforeseen monetary liability. ". . . [D]efense counsel does his client a disservice if he settles a case as to one or more [items of relief], but leaves open the possibility of further recovery or action on any of the remaining ones." Lazar v. Pierce, 757 F.2d at 439 (Torruella, J., concurring). A rule that encourages incompetent lawyering by defense counsel, implicating his ethical duties to the defendant, simply has no place in our legal system and should be rejected by the Court.

III. ADEQUATE MECHANISMS EXIST TO ENSURE THAT A SETTLEMENT CONTAINING A FEE PROVISION HAS BEEN PROPERLY NEGOTIATED AND IS FAIR AND REASONABLE.

In the event that the interests of the class members and their counsel ripen into an actual conflict during the settlement of a class action, adequate mechanisms are in place to meet the problem. The most important protection for the parties is the required court approval for the settlement of a class action. Rule 23(e) of the Federal Rules of Civil Procedure provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The purpose of this rule is to ensure that the interests of all the class

members, not just the named plaintiffs,[27] are adequately represented in the settlement. Burks v. Lasker, 441 U.S. 471, 485-486 n. 16 (1979).[28]

In order to obtain court approval for a settlement under Rule 23(e), the parties are generally required to demonstrate that the settlement is fair, reasonable, and adequate. Malchman v. Davis, 761 F.2d 893, 895 (2d Cir. 1985); Officers for Justice v. Civil Service

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27/ The rule was designed to ensure an adequate settlement for the class, not an adequate fee for the class attorney.

28/ The potential for a conflict of interest between the class representatives and the remaining class members has been widely recognized. See, e.g., Officers for Justice v. Civil Service Commission, 688 F.2d 615, 624 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); see C. Wright & A. Miller, Federal Practice and Procedure, § 1797, p. 230 (1972).

Commission, 688 F.2d at 625 and cases cited. In determining whether a settlement is fair, reasonable, and adequate, district courts have compared the substantive terms of the settlement with the strengths of plaintiffs' case. E.g., Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied, 104 S. Ct. 77 (1983). Courts have also examined the negotiation process to ensure that the settlement is the result of good-faith, arms-length bargaining and free from coercion or collusion. Id.

Thus, the established standards for court approval of a class action settlement provide adequate safeguards. The district court is able to ensure, for example, that a settlement containing a negotiated or waived fee is the product of good-faith bargaining and is a rea-

sonable compromise of the parties' claims. If the district court determines that the fee provision is too generous as compared with the class relief, or if a negotiated amount or waiver is unreasonable in light of the facts and circumstances of the case, it has the authority to reject the settlement package and send the parties back to the bargaining table or schedule the case for trial.[29/] The district court also has

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29/ E.g., Franks v. Kroger Co., 649 F.2d 1216 (6th Cir. 1981); Soskel v. Texaco, Inc., 94 F.R.D. 201 (S.D. N.Y. 1982). In cases where the fee is to be paid out of a common fund, the district court can reduce the fee to ensure that the class members have received a fair and reasonable settlement. See, e.g., Tornabene v. General Development Corp., 88 F.R.D. 53, 62 (E.D. N.Y. 1980). It would not be appropriate, however, for the district court to accept the settlement on the merits but increase the defendant's fee liability. To do so would undermine the settlement process since the fee and merits components of the settlement have been negotiated together and are "part and parcel of each other." Moore, 762 F.2d at 1110 n. 21.

the authority under Rule 23(e) to notify the class members of the proposed settlement and consider whatever objections they may have.

A potential conflict of interest, or even an actual conflict, is not unusual in the class action context.[30/] Rule 23(e) was designed, and is sufficient, to address that issue on a case-by-case basis. In sum, adoption of the Ninth Circuit rule is inconsistent with

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30/ This case, of course, is a class action and the amici have discussed the issues in that context. The amici note, however, that in non-class litigation the plaintiff is not more vulnerable because of the non-availability of Rule 23(e) review. To the contrary, in a non-class action the client can discuss a joint fees-merits settlement offer with his attorney and decide whether it represents an acceptable result. He controls the settlement decision himself. E.g., Moore v. National Ass'n of Securities Dealers, 762 F.2d at 1105 n. 18.

established ethical standards, is unnecessary in light of existing safeguards, and creates more problems than it solves.

CONCLUSION

The *amici* States ask the Court to reverse the decision of the Court of Appeals for the Ninth Circuit. Further, for the reasons stated above, the *amici* urge the Court not to adopt any *per se* rules which may prevent the normal processes and dynamics of negotiation to operate in civil rights cases, consistent with existing ethical and legal constraints.

Respectfully submitted,

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No. 84-1288

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN V. EVANS, ET AL., PETITIONERS

v.

JEFF D., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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35 pp

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the court of appeals erred in prohibiting the parties in a civil rights class action from engaging in settlement negotiations intended to produce a comprehensive settlement agreement resolving both the merits of the litigation and any claim to attorney's fees that might be advanced by the plaintiffs.

2. Whether, assuming that the court of appeals correctly invalidated the attorney's fee provision of the settlement agreement in this case, it nevertheless erred in requiring petitioners to comply with the remainder of the agreement.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	5
Argument:	
I. A per se rule against the simultaneous negotiation of attorney's fees and merits issues is impractical and inconsistent with the public policy favoring the settlement of litigation	9
A. A per se rule would seriously inhibit the settlement of litigation	9
B. This Court and several lower courts have declined to adopt a per se rule barring joint negotiations	15
C. There is no indication that Congress thought joint negotiations would thwart the goals of fee-shifting statutes	20
D. A defendant's insistence on simultaneous negotiation of the merits and attorney's fee issues is not inherently unethical	21
E. The tensions that may be occasioned by simultaneous negotiations are in many respects no different in kind from other ethical dilemmas routinely confronted by lawyers	23
F. Judicial supervision of negotiating practices should be limited to cases in which plaintiffs are able to make a strong preliminary showing of bad faith on the part of defendants	26
II. The court of appeals erred in ordering petitioners to pay respondents' attorney's fees while leaving the remainder of the settlement "agreement" intact	28
Conclusion	31

TABLE OF AUTHORITIES

Cases: Page

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 10
Allen v. *McCurry*, 449 U.S. 90 21
Ashton v. *Pierce*, 580 F. Supp. 440 12
Blum v. *Stenson*, No. 81-1374 (Mar. 21, 1984) 11, 12
Brown v. *General Motors Corp.*, 722 F.2d 1009 ..... 24, 25
Chicano Police Officer's Ass'n v. *Stover*, 624 F.2d 127 ..... 13, 18, 21
Cotton v. *Hinton*, 559 F.2d 1326 29-30
Delta Air Lines, Inc. v. *August*, 450 U.S. 346 10
El Club del Barrio, Inc. v. *United Community Corporations, Inc.*, 735 F.2d 98 ..... 19, 28
Firefighters Local Union No. 1784 v. *Stotts*, No. 82-206 (June 12, 1984) 29
Franks v. *Delaware*, 438 U.S. 154 27
General Telephone Co. v. *Falcon*, 457 U.S. 147 20
Gram v. *Bank of Louisiana*, 691 F.2d 728 ..... 13, 18
Hensley v. *Eckerhart*, 461 U.S. 424 ..... 7, 14
H.K. Porter Co. v. *NLRB*, 397 U.S. 99 29
Kremer v. *Chemical Constr. Corp.*, 456 U.S. 461 21
Lazar v. *Pierce*, 757 F.2d 435 ..... 10, 13, 17, 24, 26
Maher v. *Gagne*, 448 U.S. 122 ..... 10, 22
Malchman v. *Davis*, 761 F.2d 893 ..... 10, 17, 18
Marek v. *Chesny*, No. 83-1437 (June 27, 1985) 6, 9-10, 15, 21, 22
McDonald v. *Chicago Milwaukee Corp.*, 565 F.2d 416 19
Mendoza v. *United States*, 623 F.2d 1338, cert. denied, 450 U.S. 912 5
Migra v. *Warren City School Dist. Bd. of Educ.*, No. 82-738 (Jan. 23, 1984) 21
Moore v. *National Ass'n of Securities Dealers, Inc.*, 762 F.2d 1093 ..... 10, 11, 15, 18, 20, 25, 26, 29
Obin v. *District No. 9 of the Int'l Ass'n of Machinists & Aerospace Workers*, 651 F.2d 574 19
Officers for Justice v. *Civil Service Comm'n of San Francisco*, 688 F.2d 615, cert. denied, 459 U.S. 1217 29
Oguachuba v. *INS*, 706 F.2d 93 25

Cases—Continued: Page

Parker v. *Matthews*, 411 F. Supp. 1059, aff'd *sub nom. Parker* v. *Califano*, 561 F.2d 320 13
Pennhurst State School & Hospital v. *Halderman*, 465 U.S. 89 2
Pettway v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, cert. denied, 439 U.S. 1115 ..... 19, 29
Prandini v. *National Tea Co.*, 557 F.2d 1015 .....18, 19, 28
Smith v. *South Side Loan Co.*, 567 F.2d 306 25
Underwood v. *Pierce*, 761 F.2d 1342 11
United States v. *Armour & Co.*, 402 U.S. 673 29
White v. *New Hampshire Dep't of Employment Security*, 629 F.2d 697, rev'd, 455 U.S. 455.....6, 10, 15, 16, 18, 19, 24, 25
Wilko v. *Swan*, 346 U.S. 427 21

Statutes and rules:

Bacon-Davis Act, 40 U.S.C. 276a *et seq.* 21
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e-5(k) 20
Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988 .....4, 20, 22, 25
Equal Access to Justice Act:
28 U.S.C. 2412(d) 6, 11, 13, 16
28 U.S.C. 2412(d)(1)(A) 13
28 U.S.C. 2412 note 13
Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*.... 21
Portal-to-Portal Act of 1947, 29 U.S.C. 253(a) 7, 21
Walsh-Healey Act, 41 U.S.C. 35 21
28 U.S.C. 1738 21
42 U.S.C. 1983 2
Fed. R. Civ. P.:
Rule 16 .....8, 26, 28
Rule 16(a)(5) 28
Rule 23 20
Rule 23(e) 4, 8, 26, 28, 29
Rule 59(e) 15-16

Miscellaneous:

ABA Model Code of Professional Responsibility (1969) 17

Miscellaneous—Continued: Page

Bar Report of the District of Columbia Bar, *Final Subcommittee Report of the Committee on Attorneys Fees* (Aug./Sept. 1984) 22
131 Cong. Rec. H4763 (daily ed. June 24, 1985).... 14
H.R. 2378, 99th Cong., 1st Sess. (1985) 13, 20
H.R. Rep. 96-1418, 96th Cong., 2d Sess. (1980).... 13, 14
H.R. Rep. 99-120, 99th Cong., 1st Sess. (1985)..... 20
1 *Moore's Federal Practice* Pt. 2 (2d ed. 1984)..... 19
3B *Moore's Federal Practice* (1985 ed.) 28
S. Rep. 96-253, 96th Cong., 1st Sess. (1979) 13, 14

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INTEREST OF THE UNITED STATES

This case presents the important question whether parties to litigation may properly engage in simultaneous settlement negotiations encompassing both the merits of a case and any claim of the plaintiffs to attorney's fees. The decision of the court below, essentially imposing a per se ban on the simultaneous negotiation of the merits and attorney's fee claims, significantly impairs the public policy of encouraging settlements and avoiding protracted litigation. Accordingly, the decision may well result in an unnecessary increase in the workload of the already overburdened federal courts. In addition, as the most frequent litigant in the federal courts, the United States faces potential liability for attorney's fees under a host of fee-shifting statutes. The decision below, by prevent-

ing pre-judgment negotiation of attorney's fee issues, will make it difficult for the United States to ascertain precisely what its liability would be under a proposed settlement, thereby eliminating the very certainty that makes settlement attractive. As a result, the rule adopted by the court of appeals may frustrate or block settlement in many cases in which the United States is a defendant. Accordingly, the United States joins petitioners in urging reversal of the court of appeals' decision.

STATEMENT

1. In August 1980, respondents filed this action under 42 U.S.C. 1983 in the United States District Court for the District of Idaho on behalf of a class of mentally and emotionally handicapped children institutionalized in the State of Idaho. Respondents alleged that petitioners, several Idaho state health and education officials, were violating the federal and state constitutions and numerous federal and state statutes by failing to provide them with adequate educational and mental health services. The claims pertaining to educational services were settled with reasonable dispatch, and class counsel agreed to waive an attorney's fee (Pet. 5-6; Br. in Opp. 1). However, respondents' claims involving mental health services were litigated for over two years (Pet. App. 18a). Although settlement negotiations began at an early date, they reached an impasse in December 1981. Thereafter, both sides moved for summary judgment. On July 26, 1982, the district court granted partial summary judgment to petitioners as to all claims except those arising under the United States Constitution and one provision of Idaho law; as to those claims, the court concluded that genuine issues of material fact precluded summary judgment (J.A. 56-57). The remaining state law claim was subsequently dropped in light of *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984).

Following the district court's summary judgment ruling, the parties renewed their settlement talks. One week

before trial, the parties reached agreement on a settlement of the remaining claims, under which petitioners agreed to grant much of the substantive relief sought on behalf of the class (J.A. 95-104).

During the negotiations, petitioners stated that their agreement to the settlement was conditioned on respondents' counsel's willingness to waive attorney's fees, as he had done in the settlement of the educational services claims (Pet. App. 18a). Respondents' counsel was employed by Idaho Legal Aid (*ibid.*) and was not billing the class for his work. Idaho Legal Aid instructed respondents' counsel not to waive fees, but respondents' counsel recognized that petitioners appeared willing to provide the class with a beneficial pre-trial settlement only on condition that his attorney's fees be waived (*id.* at 18a-19a). Accordingly, he agreed to the settlement, but the parties included a conditional provision stating that "[p]laintiffs and defendants shall each bear their own costs and attorney's fees thus far incurred, *if so approved by the Court*" (*id.* at 10a (emphasis added)).

2. The proposed settlement was presented to the district court for approval (J.A. 88-94). That court concluded that the ethical problems of concern to respondents' counsel would be implicated only in the so-called "sweetheart" situation, in which a plaintiff's attorney might subordinate the interests of his client to his own self-interest in obtaining a fee (J.A. 93). The district court determined that no ethical problems were raised by the situation here, in which the issue was "what is fair to the attorney," rather than to the plaintiff class (*ibid.*). Noting that petitioners were "not willing to concede that they were obligated to do the things that they were doing [in the settlement] * * *, but they were willing to do them as long as their costs were outlined and they didn't face additional costs," the court found no ethical violation in a plaintiff's attorney's decision "to give up his attorney fees in the interest of getting a better bargain for his client" (*ibid.*). Accordingly, the

district court signed the settlement agreement (Pet. App. 10a) and denied respondents' motion for an award of costs and attorney's fees (*id.* at 11a-12a).

3. Respondents appealed the denial of their motion for costs and fees, and the courts of appeals reversed (Pet. App. 17a-25a). The court noted that respondents were prevailing parties by virtue of the settlement and that, absent the provision in the settlement stipulation for a waiver of fees, they would have been eligible for an attorney's fee award under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. 1988 (Pet. App. 19a). The court of appeals then stated that, by approving the waiver of fees simply because it was contained in the stipulation, the district court had not discharged its duty under Fed R. Civ. P. 23(e) to review the reasonableness of all terms in a class action settlement, including any provision concerning attorney's fees (Pet. App. 20a). Having so found, the court of appeals then reviewed the attorney's fee waiver provision and invalidated it.

The Ninth Circuit reasoned that there are "strong public policy considerations in favor of awarding attorney's fees in suits in which representative parties serve interests broader than their own self interest," and that this is particularly true in civil rights cases (Pet. App. 22a). The court of appeals also stated that there is a special reason for courts to scrutinize an attorney's fee provision in a class action settlement because conflicts can arise in such situations, pitting the attorney's self-interest in obtaining a large fee against the client's interest in obtaining the best possible merits relief as quickly as possible (*id.* at 23a-24a).

The court of appeals noted that it had declined in the past to adopt a per se rule against simultaneous negotiation of the merits and attorney's fee issues (Pet. App. 24a-25a), but, for all practical purposes, it did so in this case, stating flatly that "[a]ttorney's fees should not have been a part of the settlement of the claims of the

class" (*id.* at 25a).[1] The court concluded that the "historical background of both Rule 23 and section 1988, as well as our experience since their enactment, compel the conclusion that a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court" (*ibid.*). The Ninth Circuit ruled that the district court should instead "make its own determination of the fees that are reasonable," and it remanded the case for that purpose (*ibid.*). The court of appeals left the remainder of the settlement agreement in effect and later entered an order specifically requiring petitioners to comply with the merits portion of the settlement (*id.* at 28a).

SUMMARY OF ARGUMENT

I. The court of appeals' rule flatly prohibiting the simultaneous negotiation of the merits and attorney's fee issues rests on two premises. The first is that the only public policy at stake is that of compensating attorneys who bring successful civil rights actions, and the second is the implicit assumption that a defendant who seeks to settle the attorney's fee portion of a case along with the merits is acting in bad faith. Neither premise is correct.

The court of appeals completely overlooked the strong public interest in the settlement of litigation, an interest that is as applicable to civil rights cases as to any other type of litigation. There can be no doubt that a ban on joint negotiations will result in fewer cases being settled. If a defendant is not permitted to make a comprehensive offer that will dispose of the entire case, his incentive to settle is greatly reduced and, in many cases,

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[1] The only apparent exception to the court of appeals' absolute rule would arise upon a demonstration of "unusual circumstances," such as the Department of Justice's participation as an intervenor to represent the public interest, thereby minimizing the potential conflict of interest between the plaintiffs' lawyer and his clients. See Pet. App. 24a-25a; *Mendoza* v. *United States*, 623 F.2d 1338 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

eliminated entirely. See, *e.g.*, *Marek* v. *Chesny*, No. 83-1437 (June 27, 1985), slip op. 4.

The court of appeals especially erred in its unstated but nevertheless manifest assumption that defendants who want to negotiate a comprehensive settlement, including any liability for attorney's fees, are ipso facto acting in bad faith to drive a wedge between plaintiffs and their lawyers. As this Court observed in *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 454 n.15 (1982), "[i]n considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees." Moreover, there are significant numbers of relatively minor disputes, many of which may properly be classified as nuisance litigation, that defendants would be willing to settle by providing relatively modest relief, so long as they know that the settlement will bring a complete end to the litigation. Absent that certainty, however, such defendants may conclude they are better off expending the resources necessary for a trial they expect to win than settling the merits of a case while leaving themselves subject to open-ended attorney's fee liability.

Thus, the court of appeals should have recognized that there is nothing unethical about *any* reasonable settlement offer, even if it puts the plaintiff and his attorney to a difficult choice. Cf. *Marek* v. *Chesny*, slip op. 8-9. If a defendant is willing to give up a realistic chance of prevailing on the merits, then it is not at all unreasonable to expect the plaintiff to give up attorney's fees or to accept a reduced attorney's fee award. After all, if the defendant chose to litigate the case and won, the plaintiff would get *no* attorney's fees.

A prohibition on simultaneous negotiation of the merits and attorney's fees would especially discourage settlements in many cases in which the United States is a party. Under the Equal Access to Justice Act, 28 U.S.C. 2412(d), the government is not liable for attorney's fees even in a case it has lost, so long as it can demonstrate

that its position was "substantially justified." Thus, a federal agency with even a colorable defense to a lawsuit would have no incentive to settle the case if the issue of attorney's fees had to be left open, because the agency would find itself litigating the merits of the case in any event when it was called upon to demonstrate that its position, even though ultimately unsuccessful, was substantially justified. Such a result runs counter to this Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).

The court of appeals also erred in assuming that Congress's purposes in enacting fee-shifting statutes would be thwarted by simultaneous negotiations. In fact, there is no evidence that Congress meant to impose special restrictions on the negotiating procedures available to counsel in civil rights cases. The absence of any such evidence is particularly striking in light of the fact that Congress *has* explicitly limited the ability of private parties to settle litigation on terms that, in Congress's judgment, would be inconsistent with overriding public policy in other areas. See Portal-to-Portal Act of 1947, 29 U.S.C. 253(a).

II. The major defect in the court of appeals' analysis is the assumption that simultaneous negotiations raise such a unique ethical dilemma for plaintiffs' attorneys that no resolution short of a per se prohibition against such negotiations will suffice. In fact, lawyers are every day placed in situations in which their interests as businessmen may conflict with the duties they owe their clients. But the proper resolution of such conflicts is, in the vast majority of cases, a matter to be worked out between the plaintiff's attorney and his client; it involves neither the defendant nor the judiciary. The court of appeals utterly failed to explain—or even to consider—why the usual methods for resolving attorney/client conflicts are not appropriate in the instant situation.

We are willing to assume, however, that in a small handful of cases judicial intervention may be warranted because the defendant is acting in bad faith. If, for example, a defendant has no realistic defense to a lawsuit, his insistence on a fee-waiver provision may be an obvious attempt to evade a clear statutory attorney's fee obligation. In such cases, because courts have the authority to police the ethical conduct of lawyers appearing before them, it may be appropriate for a plaintiff to seek the aid of the district court under Fed. R. Civ. P. 16 or 23(e). But such situations should be rare, and a plaintiff should be required to make a strong preliminary showing of bad faith on the part of the defendant before a court steps in to supervise the negotiating process.

We propose this threshold requirement for two reasons. First, in the absence of unethical conduct, the courts have no inherent authority to impose their own notions of proper negotiating strategies. Second, it seems clear that a district court called upon to review the propriety of particular negotiating tactics could do so only after such a thorough review of the case that the matter might as well be tried instead of settled. In the absence of any evidence that bad faith settlement offers are widespread, it would be a mistake to permit the routine invocation of rather elaborate judicial machinery that is likely to prove nearly as time consuming and cumbersome as a trial.

III. Even if the court of appeals correctly imposed a ban on simultaneous negotiation of the merits and attorney's fee issues, the court clearly erred in striking the attorney's fee waiver provision from the settlement agreement in this case while requiring petitioners to comply with the remainder of the agreement. Courts have no roving authority selectively to strike provisions from a decree negotiated by the parties to the litigation; if a court concludes that one portion of the agreement is invalid, the proper remedy is to disapprove the entire agreement and to send the parties back to the bargain-

ing table or allow them to litigate their dispute. In this case, the record is clear that petitioners would not have agreed to the consent decree absent the waiver-of-fees provision. See J.A. 92, 109-110, 115. Accordingly, the court of appeals erred in holding petitioners to a "bargain" to which they never consented.

ARGUMENT

I. A PER SE RULE AGAINST THE SIMULTANEOUS NEGOTIATION OF ATTORNEY'S FEES AND MERITS ISSUES IS IMPRACTICAL AND INCONSISTENT WITH THE PUBLIC POLICY FAVORING THE SETTLEMENT OF LITIGATION

Permeating the court of appeals' analysis of this case are two clearly mistaken assumptions. The first is the court's apparent view that only one public policy is implicated—that of compensating attorneys who bring successful civil rights actions. The second is an unstated but nonetheless manifest presumption that defendants who want to settle the attorney's fee portion of a case along with the merits are acting in bad faith. Had the court taken a broader view of the public policies at stake and been less eager to attribute improper motives to defendants, it would have been apparent that the rule it has adopted is both counterproductive and impractical.[2]

A. A Per Se Rule Would Seriously Inhibit The Settlement Of Litigation

The court of appeals completely overlooked the strong public interest in the settlement of litigation, an interest that is as applicable to civil rights cases as it is to any other type of litigation. See, *e.g.*, *Marek* v. *Chesny*, No.

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[2] It is not at all clear how much of the court of appeals' analysis turned on the fact that the instant case is a class action and how much depended on the court's apparent perception that civil rights cases, whether brought as class actions or not, are to be encouraged at all costs. In our view, however, the rule adopted by the court of appeals does not appear to be limited to class action litigation.

83-1437 (June 27, 1985), slip op. 8; *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 363-364 (1981) (Powell, J., concurring); *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 40 (1974). Indeed, the public policy favoring settlements is in many respects at its strongest in civil rights litigation, because the parties often have to deal with each other after the litigation ends. Thus, any rule that discourages settlements should be closely scrutinized.

The per se rule adopted by the court of appeals surely would discourage settlements. As this Court noted in *Marek*, slip op. 4, "[i]f defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers." The Court made the same point in *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 454 n.15 (1982) ("In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees."). See also, *e.g.*, *Moore* v. *National Ass'n of Securities Dealers, Inc.* (*NASD*), 762 F.2d 1093, 1104-1105 (D.C. Cir. 1985) (opinion of MacKinnon, J.); *id.* at 1112 (Wald, J., concurring); *Malchman* v. *Davis*, 761 F.2d 893, 905 (2d Cir. 1985); *id.* at 907 (Newman, J., concurring); *Lazar* v. *Pierce*, 757 F.2d 435, 439 (1st Cir. 1985) (Torruella, J., concurring). In fact, it often would be irresponsible for defense counsel to agree to a settlement without knowing the full monetary impact on his client. Accordingly, defendants and their counsel necessarily would discuss among themselves the issue of attorney's fees, but they would be barred, under the court of appeals' per se rule, from discussing that issue with plaintiffs' counsel. The result would be a counterproductive breakdown in communications between the parties that inevitably would reduce the number of cases settled. See, *e.g.*, *Moore* v. *NASD*, 762 F.2d at 1112 (Wald, J., concurring) (footnote omitted) ("[I]t seems quite unrealistic to cabin the bar-

gaining by forbidding the defendant, regardless of the circumstances, to tell the plaintiff *why* the defendant is refusing overtures, if the reason is an unwillingness to pay fees.").

Thus, in cases in which a defendant believes that he has at least a reasonable possibility of success at trial, it may be impossible to decide whether to accept a settlement offer on the merits if he cannot know the full extent of his liability. Crucial information needed for informed decisionmaking is missing. A defendant will know only that, after agreeing to a compromise on the merits, he could be faced with a large attorney's fee award imposed by the district court.[3] What is particu-

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[3] It has been suggested that this problem can be avoided if plaintiffs' attorneys advise defendants of the number of hours of work for which they will seek reimbursement, and at what rate. This suggestion does not adequately protect defendants, because it tells them only what the outermost limit of their liability might possibly be. See *Moore* v. *NASD*, 762 F.2d at 1105 n.16 (opinion of MacKinnon, J.). That figure may bear no realistic relationship to defendants' ultimate liability pursuant to a court-ordered attorney's fee. In one recent case, for example, the district court, following the entry of a consent decree on the merits, awarded plaintiffs' counsel $1,129,450 in attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d). On the government's appeal, the Ninth Circuit reduced the award to $322,700. *Underwood* v. *Pierce*, 761 F.2d 1342 (1985). Although even that amount is still being contested by the government, the $806,750 difference between the initial award and the reduced award on appeal is clearly so great that, even had the government been advised in advance of the maximum amount that plaintiffs intended to seek in fees, it would have had no incentive to settle if, as was the case in *Underwood*, its litigation judgment convinced it that plaintiffs had no reasonable prospect of recovering the amount they sought.

Another problem with the proposed "solution" of having plaintiffs advise defendants of what they intend to seek in fees is that, notwithstanding this Court's decision in *Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), "multipliers," or "upward adjustments," remain essentially a wild card in attorneys' fee litigation. It is our experience that plaintiffs frequently submit fee applications detailing the hours they have expended on a case and the hourly rate they seek, but then add a conclusory request for a "multi-

larly disturbing about the court of appeals' per se rule is that it prohibits the parties from negotiating attorney's fee issues even when both sides would otherwise be able to agree on what would constitute a reasonable fee. The decision below is not limited to those cases in which defendants insist that plaintiffs' counsel waive all fees, even though there is no conceivable public policy that could justify the preclusion of package settlement proposals that might in fact be acceptable to both plaintiffs and their attorneys.

In addition, there are large numbers of relatively minor disputes, some of which may properly be classified as nuisance suits, that the government, or any defendant, would be willing to settle in lieu of expending the resources necessary for a trial. But no sensible defendant is likely to find settlement attractive if, instead of saving the money needed to try a case, it finds itself saddled with the plaintiff's attorney's fees. In such cases, a defendant's insistence on a waiver of fees in return for an agreement to provide relatively modest relief on the

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plier" without specifying the factor by which they believe the award should be enhanced. (The respondents in *Blum* did exactly that. See slip op. 10.) Often, the district courts respond to such requests seemingly by picking a number out of the air, sometimes resulting in a doubling or tripling of the "lodestar" fee request.

Finally, there is significant room for compromise in disputes, such as the amount of an attorney's fee award, that involve only money. The amount that a plaintiff's attorney might willingly accept in settlement will often be far less (even half) than what he would ask for in a fee request to a court. For that reason as well, defendants will not derive realistic information if all they are told is the maximum amount that the plaintiff will seek in fees. See generally *Ashton* v. *Pierce*, 580 F. Supp. 440, 444 (D.D.C. 1984) ("Unable to settle the question of fees outside the court, lawyers make excessive claims [in court]. * * * * * Lawyers who treat the EAJA as designed to compensate counsel in the same generous manner as some lawyers are compensated in private practice should take heed of the consequences. * * * Failure to reach prompt and reasonable fee dispositions * * * may eventually jeopardize the golden goose.").

merits does not indicate bad faith bargaining at all; rather, it suggests nothing more than common sense. See, *e.g.*, *Lazar* v. *Pierce*, 757 F.2d at 438 (federal agency properly insisted that plaintiff waive any claim for fees against the government because it settled the merits by agreeing to a "gratuitous republication" of its existing regulations); *Gram* v. *Bank of Louisiana*, 691 F.2d 728, 730 (5th Cir. 1982) ("[N]uisance settlements should not give rise to fee awards."); *Chicano Police Officer's Ass'n* v. *Stover*, 624 F.2d 127, 131 (10th Cir. 1980) (same); *Parker* v. *Matthews*, 411 F. Supp. 1059, 1064 (D.D.C. 1976), aff'd *sub nom. Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977) (same). Accordingly, the rule adopted by the court of appeals eliminates a crucial element of negotiating flexibility needed to keep minor disputes from being litigated unnecessarily.

A prohibition on simultaneous settlement negotiations encompassing the merits and attorney's fees would especially discourage settlements in many cases in which the United States is a party. The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), provides that certain parties who prevail in litigation against the government are entitled to an attorney's fee award unless the government can show that its position was "substantially justified." 28 U.S.C. 2412(d)(1)(A).[4] The mere fact that the government loses a case was *not* intended to create a presumption that its position lacked "substantial justification." S. Rep. 96-253, 96th Cong., 1st Sess. 7 (1979); H.R. Rep. 96-1418, 96th Cong., 2d Sess. 11 (1980). Indeed, the government need not even demon-

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[4] Section 2412(d) of the EAJA was enacted with a sunset provision, and it expired on October 1, 1984. See 28 U.S.C. 2412 note. The 98th Congress passed a bill intended to make the section permanent, but the President vetoed it. On June 24, 1985, the House passed H.R. 2378, 99th Cong., 1st Sess., another bill to reauthorize Section 2412(d) on a permanent basis, and the bill is now under consideration by the Senate. Although the new statute would differ in some respects from the prior one, the "substantial justification" provision would remain unchanged.

strate that "its decision to litigate was based on a substantial probability of prevailing." S. Rep. 96-253, *supra*, at 7; H.R. Rep. 96-1418, *supra*, at 11. See also 131 Cong. Rec. H4763 (daily ed. June 24, 1985) (remarks of Rep. Kastenmeier) ("Proving [substantial justification] is not intended to be so difficult that the Government may only avoid fees by prevailing in the litigation.").

In light of the standard for "substantial justification," there is little reason for a federal agency with a colorable defense to a lawsuit to enter into a settlement that does not resolve the entire case, including any attorney's fee issues. If it did, the agency would in all likelihood find itself shortly thereafter litigating the merits of the case when it was called upon to demonstrate "substantial justification" for its position in response to a request for fees under EAJA. And if the government must litigate the merits anyway, the major incentive for settlement has been removed. Therefore, a ban on simultaneous negotiations would often have the effect of inducing the government to take its chances at trial, even though a settlement otherwise would have been possible.

Such a result clearly makes no sense. This Court has cautioned that "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983). But any incentive to settle a fee dispute is greatly diminished, if not entirely eliminated, once the merits of the litigation have been concluded. The defendant, having agreed to provide relief on the merits, is left with no leverage to induce a plaintiff to discount what may be a totally unrealistic demand for fees. And the plaintiffs in a case such as this one, having obtained satisfactory relief through settlement and under no obligation to pay their attorney's fees themselves, no longer have an interest in the fee dispute and therefore will not serve as a check on their attorney's efforts to obtain a sizeable fee. The net

result often will be a "second major litigation" devoted solely to attorney's fees.

Finally, it should not be forgotten that settlements are as much in the interests of plaintiffs as defendants. See, *e.g.*, *Marek* v. *Chesny*, slip op. 8. For example, a plaintiff may realize after some discovery that he does not have a strong claim on the merits. See *Moore* v. *NASD*, 762 F.2d at 1098-1099 (opinion of MacKinnon, J.). The plaintiff may be reluctant to abandon his claim entirely, but he may be willing to settle for reduced relief. Such a settlement would be difficult to reach if the defendant in the case cannot be assured that the agreement will conclude the litigation entirely. Similarly, a per se rule against package settlements may often result in a defendant's making a substantially less favorable offer on the merits than might otherwise be the case, in order to provide himself with an "economic cushion" in the event that, after settlement, he finds himself facing a substantial attorney's fee request.

The conclusion is inescapable that a rule barring joint negotiation of the merits and attorney's fee issues would have the negative result of causing more cases to be tried unnecessarily. Such a rule would be contrary to the public policy of encouraging settlements, and it should be rejected.

B. This Court And Several Lower Courts Have Declined To Adopt A Per Se Rule Barring Joint Negotiations

In recognition of the impediments to settlement just discussed, most courts that have considered the propriety of simultaneous merits and attorney's fee negotiations have declined to adopt the per se rule imposed by the court below. Indeed, this Court itself rejected such a rule in *White* v. *New Hampshire*, *supra*. There, the issue before the Court was whether a request for attorney's fees is a motion to alter or amend the judgment that must be filed within the 10 days prescribed by Fed. R.

Civ. P. 59(e). In arguing that Rule 59(e) was inapplicable to fee requests, the petitioner in *White* contended that "fee negotiations should routinely be deferred until after the entry of a merits judgment" in order to avoid potential conflicts of interest between the plaintiff and his attorney (455 U.S. at 454 n.15). The Court was not swayed by the argument (*ibid.*):

> Although sensitive to the concern that petitioner raises, we decline to rely on this proffered basis. In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.[5]

Similarly, the court of appeals in *White* endorsed simultaneous negotiations. The court stated: "Nor in a consent decree context do we see anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations. * * * Failure to confront the fees issue merely muddies the waters * * *." *White* v. *New Hampshire Dep't of Employment Security*, 629 F.2d 697, 705 (1st Cir. 1980), rev'd on other grounds, 455 U.S. 445 (1982). More recently, the First Circuit upheld the denial of a fee award against the Department of Housing and Urban Development, notwithstand-

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[5] In response to the Court's request for the views of the United States, the government filed a brief at the petition stage in *White*, in which we stated that "detailed fee discussions should ordinarily be conducted after agreement on the merits has been reached" in order to avoid the ethical considerations raised by White. Br. for the United States as Amicus Curiae, at 11. Upon further reflection, and with the benefit of nearly four years of experience under the Equal Access to Justice Act, 28 U.S.C. 2412(d), we have concluded that our earlier suggestion was impractical and that the ethical concerns, though not insignificant in particular cases, are neither so frequent nor so intractable as to call for the per se rule adopted by the court of appeals.

ing the fact that the agency had insisted on an attorney's fee waiver provision as part of the settlement of the case. *Lazar* v. *Pierce*, *supra*. The court implicitly approved HUD's insistence on the combined merits and fee waiver arrangement because of the strength of the agency's defense on the merits (757 F.2d at 438).[6]

The Second Circuit also has recently concluded that joint settlement negotiations are proper, in large part because they lead to more settlements. *Malchman* v. *Davis*, 761 F.2d 893, 905 (1985). In *Malchman*, certain members of the plaintiff class attacked the final settlement, arguing that it was fatally tainted by joint negotiations on the merits and attorney's fees. While noting that simultaneous negotiations can sometimes cause conflicts between a class and its attorneys, the Second Cir-

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[6] However, the First Circuit criticized the conduct of other defendants in the case who had agreed to provide essentially full merits relief for the plaintiff, but only in exchange for a waiver of fees (757 F.2d at 437). The court disapproved of the conduct of those defendants because it believed that, unlike HUD, they were using the settlement process to avoid a statutory fee obligation (*ibid.*).

At the same time, the First Circuit also attacked the conduct of plaintiff's counsel, who had signed the settlement stipulation with full knowledge that he intended to renege on the waiver-of-fees provision as soon as it was entered (757 F.2d at 438-439). Employing a novel approach to the issue presented in this case, the court then concluded that joint negotiations do not necessarily cause an ethical dilemma for plaintiff's counsel; the court reasoned that, when statutory fee-shifting provisions are involved, a lawyer has a public duty to collect a fee from the defendant so that other attorneys will be encouraged to accept like cases in the future (*id.* at 438). Consequently, the court concluded that a plaintiff's attorney may be able to decline a settlement offer that is favorable to his client when the defendants offer too low a fee or seek a complete waiver of fees (*ibid.*). Although the court's reasoning was certainly innovative, it seems to be a classic example of the tail wagging the dog, and we doubt that it can be squared with a lawyer's unflagging duty to represent his client's interests. See, *e.g.*, ABA Model Code of Professional Responsibility EC 5-1 to 5-24 (1969). See also *Lazar* v. *Pierce*, 757 F.2d at 440 (Torruella, J., concurring), and note 10, *infra*.

cuit nevertheless upheld the attorneys' fee award because there was no evidence of a "sweetheart" deal between the defendants and the attorneys for the class. Citing this Court's decision in *White* v. *New Hampshire*, *supra*, the Second Circuit concluded that, "[a]bsent special circumstances," joint settlement negotiations should not be barred (761 F.2d at 905).

Similarly, the District of Columbia Circuit has declined to impose a general rule against joint negotiations *Moore* v. *NASD*, 762 F.2d at 1104 (opinion of MacKinnon, J.); *id.* at 1113-1114 (Wald, J., concurring). The court held that a representative plaintiff in a class action may "voluntarily and on [his] own initiative" offer to waive an attorney's fee in order to reach a settlement (*id.* at 1105 (opinion of MacKinnon, J.)). The court so ruled in the context of a case in which the plaintiff recognized that her claim on the merits was not strong, and she agreed to accept as a settlement a plan that the defendant contended it had intended to adopt in any event.[7] Two other courts of appeals also have stated that plaintiffs are free to waive fee awards as part of an overall settlement. See *Gram* v. *Bank of Louisiana*, 691 F.2d at 730; *Chicano Police Officer's Ass'n* v. *Stover*, 624 F.2d at 132.

The Third Circuit, by contrast, has criticized the practice of simultaneous negotiations and, in the seminal decision on the issue, apparently imposed a per se ban against the practice. *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1021 (1977). There, the court was concerned that simultaneous negotiations could lead to "sweetheart" deals between the defendants and the plaintiffs' class counsel, to the detriment of the class (*ibid.*). However, the court failed to consider the problems accompanying any rule requiring bifurcated negotiations, and *Prandini*

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[7] The court reserved the question of the propriety of a defendant's settlement offer that encompasses both the merits and attorney's fees and costs (762 F.2d at 1105 n.17 (opinion of MacKinnon, J.)).

is therefore of limited value. Indeed, the Third Circuit itself has recently recognized, but not had occasion to resolve, the problems created by *Prandini*. *El Club del Barrio, Inc.* v. *United Community Corporations, Inc.*, 735 F.2d 98, 101 n.3 (1984). Finally, two other circuits have noted the concern addressed in *Prandini*, but they have not adopted any per se rule governing settlement negotiations. *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists & Aerospace Workers*, 651 F.2d 574, 582-583 (8th Cir. 1981); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 n.71 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

In short, the courts of appeals, as well as this Court in *White*, have recognized, either directly or implicitly, that the *Prandini* approach creates at least as many problems as it purports to solve. The court below, on the other hand, failed even to recognize the difficulties it was creating, and its opinion is lacking in persuasive force. See *McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 422 (7th Cir. 1977) ("*Per se* rules often represent the abdication of judicial discretion rather than its informed exercise.").[8]

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[8] There is an additional irony in the Ninth Circuit's ruling that should not go unmentioned. Although the court rested its decision in large part on concerns unique to class actions (see, *e.g.*, Pet. App. 23a), it completely overlooked the fact that the Manual for Complex Litigation, while noting that simultaneous negotiations may cause conflicts of interest, nevertheless requires that *all* amounts to be paid by the defendants in a class action settlement "should be known and disclosed at the time the fairness of the settlement is considered." 1 *Moore's Federal Practice* Pt. 2, ¶ 1.46, at 74 (2d ed. 1984) (footnote omitted). The reason for this disclosure requirement is to guard against the possibility that class counsel may be "more interested in the amount to be paid as fees than in the amount to be paid to the plaintiffs." *Id.* at 75. Although that is not the concern in this case, the Ninth Circuit nevertheless stated that the two situations, *i.e.*, "sweetheart" deals and "sacrifice" demands, are essentially similar (Pet. App. 23a), yet it never discussed the Manual's conclusion that simultaneous negotiation and disclosure is the appropriate course of action.

C. There Is No Indication That Congress Thought Joint Negotiations Would Thwart The Goals Of Fee-Shifting Statutes

The court of appeals based its decision in part on Congress's intent to promote the bringing of meritorious civil rights actions, as evidenced by the enactment of fee-shifting statutes such as the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988 (Pet. App. 21a-23a). Significantly, however, there is no evidence that Congress deemed a prohibition on simultaneous negotiations necessary to the accomplishment of the goals of attorney's fee statutes such as Section 1988 or the EAJA. As the D.C. Circuit found in *Moore* v. *NASD*, 762 F.2d at 1100 (opinion of MacKinnon, J.), there is no indication in either the language or legislative history of Section 1988 or the analogous attorney's fee provision contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), that Congress meant to restrict the negotiation and waiver of attorney's fees. Moreover, in a recent report accompanying H.R. 2378, the bill to reauthorize the EAJA (see note 4, *supra*), the House Judiciary Committee made clear its assumption that joint negotiations are permissible. See H.R. Rep. 99-120, 99th Cong., 1st Sess. 18-19 (1985). For certain types of cases, the Committee "presumed that any claim for expenses and fees under the [EAJA] which a party might have asserted in the event of trial would be considered by the parties in their negotiations and that an appropriate allowance, if any, would be made in the settlement amount agreed upon, so that a final judgment achieved through settlement shall foreclose thereafter the assertion of any such claim" (*ibid.*).

In the same vein, Congress has required civil rights plaintiffs to comply with the procedural rules applicable to all other types of litigation. In *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 156-159 (1982), the Court held that a private Title VII plaintiff seeking to maintain a class action must comply with the requirements of Fed. R. Civ. P. 23. Similarly, the Court refused to find that Congress implicitly intended to exempt civil rights cases

from the ordinary operation, under 28 U.S.C. 1738, of res judicata, *Migra* v. *Warren City School Dist. Bd. of Educ.*, No. 82-738 (Jan. 23, 1984), slip op. 4-9; *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461 (1982), and of collateral estoppel, *Allen* v. *McCurry*, 449 U.S. 90, 97-99 (1980). It is clear, therefore, that the court of appeals erred in supposing that Congress would have intended a special rule to govern settlement negotiations in civil rights cases.

This absence of special legislative treatment of civil rights cases is of some significance, because Congress *has* explicitly limited the ability of parties to negotiate settlements in other contexts. Under the Portal-to-Portal Act of 1947, 29 U.S.C. 253(a), for example, Congress prohibited the settlement of causes of action on terms that would be inconsistent with the requirements of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, the Walsh-Healey Act, 41 U.S.C. 35, or the Bacon-Davis Act, 40 U.S.C. 276a *et seq.* Cf. *Wilko* v. *Swan*, 346 U.S. 427 (1953) (parties may not agree to settle securities law disputes through arbitration, but must instead pursue the judicial remedies provided in the Securities Act of 1933). Thus, Congress is fully capable of restricting the ability of parties to settle litigation on their own terms when it believes that such restrictions are necessary to effectuate particular public policies. As one court has noted, however, the issue in this case does not implicate "one of those situations in which Congress has prohibited settlements covering payment of attorneys' fees." *Chicano Police Officer's Ass'n* v. *Stover*, 624 F.2d at 132. Good faith settlement offers, even if they present plaintiffs and their counsel with hard choices, are in no way inconsistent with the goals of civil rights fee-shifting statutes. See *Marek* v. *Chesny*, slip op. 8-9.

D. A Defendant's Insistence on Simultaneous Negotiation Of The Merits And Attorney's Fee Issues Is Not Inherently Unethical

For the many reasons we have previously noted, a defendant's offer of settlement conditioned on a waiver of

fees or the payment of fees in an amount less than that demanded by the plaintiff is not ipso facto indicative of bad faith or unethical conduct. This also was the conclusion of a special subcommittee appointed by the Chief Judges of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit (Bar Report of the District of Columbia Bar, *Final Subcommittee Report of the Committee on Attorneys Fees* (Aug./Sept. 1984)):

> [The subcommittee] recognized that the purpose of [simultaneous] settlement offers is not, in most cases, to create an attorney-client conflict, nor to punish or deter plaintiffs' attorneys from taking on fee shifting cases. Generally speaking, the reason that defendants make such offers is to limit their total exposure, which could not occur if a two-stage settlement process were mandatory.

We know of no evidence to refute the subcommittee's conclusion that bad faith offers are simply not at issue in the vast majority of cases. To the contrary, a defense attorney who failed to negotiate a comprehensive settlement, including his client's liability for attorney's fees, might well be acting negligently. There is, in short, nothing unethical in a defendant's proposing *any* good faith settlement, even if it puts the plaintiff and his attorney to a difficult choice. Cf. *Marek* v. *Chesny*, slip op. 8-9.

If a defendant gives up a realistic chance of prevailing on the merits in a debatable case, then it seems not at all unreasonable to propose that a plaintiff give up the possibility of full attorney's fees. In the typical civil rights case, a defendant will have made a substantial concession with respect to attorney's fees merely by agreeing to settle the merits, because it is well established that a plaintiff who prevails through settlement ordinarily is entitled to an attorney's fee award under Section 1988. See, *e.g.*, *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980). In exchange for the defendant's implicit concession concerning plaintiff's *eligibility* for a fee award, it is perfectly reasonable for the defendant to propose that the plaintiff make a

comparable concession with respect to the *amount* of any fee award. After all, if the defendant litigated and *won* on the merits, the plaintiff would get *no* attorney's fees.[9]

We further note that any presumption of bad faith or unethical conduct is particularly unwarranted when the government seeks a waiver of attorney's fees under the EAJA. As previously explained (see pages 13-14, *supra*), the United States is not liable for fees under the EAJA if its position on the merits, even though ultimately unsuccessful, was "substantially justified." In a debatable case, therefore, the United States may properly conclude that its chances of prevailing at trial are marginal, but that its defenses nevertheless meet the test of substantial justification. If the United States proposes a settlement offer in such a case, it may fairly condition that offer on a waiver of attorney's fees, based on its assessment that it would not be held liable for fees even if it litigated the case and lost. In a case of this type, there can be no credible claim that the government's negotiating practices are improper.

E. The Tensions That May Be Occasioned By Simultaneous Negotiations Are In Many Respects No Different In Kind From Other Ethical Dilemmas Routinely Confronted By Lawyers

The judgment below is based on the view that the simultaneous negotiation of attorney's fees and merits

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[9] On the other hand, we recognize that a defendant who has no realistic defense on the merits gives up nothing when he makes a settlement offer, and it cannot be a good faith settlement proposal to give up nothing in return for something, to wit, the plaintiff's waiver of attorney's fees. Such cases, however, appear to be quite rare, and the court of appeals' per se rule is surely judicial overkill in the absence of any evidence that bad faith offers are a common practice on the part of defendants. In the instant case, we know of no evidence in the record that would support a finding of bad faith on the part of petitioners, and the court of appeals did not rest its decision on any such finding. Indeed, at the time that the parties negotiated their settlement, the district court already had granted summary judgment against respondents on most of their claims (J.A. 56-57), and thus it cannot be contended that this was a case in which petitioners had no viable defenses.

issues raises a unique ethical problem for plaintiffs' counsel that requires a prophylactic rule. However, as the Court recognized in *White* v. *New Hampshire*, 455 U.S. at 454 n.15, it is not at all obvious that the ethical problem perceived by the Ninth Circuit is irresolvable in the absence of a special rule. Indeed, lawyers are every day placed in situations in which their own interests as businessmen may conflict with their clients' needs, but it has never been supposed that judicial intervention in the attorney/client relationship is necessary to deal with those problems.

For example, an attorney who has taken a case on a contingent fee basis may have quite a different reaction to a settlement proposal than his client. The attorney may view the case as weak and want the client to accept a low settlement offer on the theory that any recovery is better than none. The client, on the other hand, may firmly believe that he can obtain a more favorable judgment at trial. Or the situation may be reversed, with the client anxious to accept even a low settlement offer because, for personal, financial, or emotional reasons, he wants to avoid a trial. The lawyer, on the other hand, may feel that he has invested too much time and effort in the litigation to accept a low settlement offer. In either event, when the lawyer advises his client whether to accept the settlement offer, he must of course put aside entirely his personal interest in a large percentage recovery.

Numerous similar examples could be imagined; indeed, they are inherent in a system that demands that an attorney put his client's interests above his own.[10] The important point, however, is that the consequences of conflicts of this sort cannot fairly be visited upon the de-

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[10] Contrary to the suggestion of the First Circuit in *Lazar* v. *Pierce*, 757 F.2d at 438, that rule is no different in civil rights cases. See *Brown* v. *General Motors Corp.*, 722 F.2d 1009, 1011 (2d Cir. 1983) (stating, after examining the Civil Rights Attorney's Fees Awards Act of 1976, that "[t]here is simply no reason to believe that Congress intended to diminish substantially the attorney's duty of undivided loyalty to his or her client.").

fendant; their proper resolution is a matter between the plaintiff's attorney and his client. A fundamental flaw in the lower court's decision is its failure even to mention, much less explain, why, at least for the vast majority of cases, the usual methods available to lawyers faced with ethical dilemmas cannot be employed here. Unlike this Court in *White*, 455 U.S. at 454 n.15, the Ninth Circuit was apparently of the view that "no resolution is ever available to ethical counsel." But the D.C. Circuit has recently refuted that notion by suggesting several viable options (*Moore* v. *NASD*, 762 F.2d at 1105 n.17 (opinion of MacKinnon, J.)):

> [P]laintiffs' counsel could reduce the ethical tension by informing their clients early on of the potential conflict of interest. If the conflict does arise, full disclosure and client participation in the settlement negotiations may mitigate its effect. Alternatively, carefully drafted retainer agreements could minimize the potential conflicts—*e.g.*, by vesting the statutory fee recovery in the client. By this method, the attorney and client would no longer have the independent claims for fees which create the conflicts of interest in simultaneous negotiations.[11]

Judge Wald offered equally pertinent observations (*Moore* v. *NASD*, 762 F.2d at 1112 n.1 (Wald, J., concurring)):

> [M]y belief is that most public interest counsel explain the financial details of the litigation well in

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[11] In this respect, it should not be forgotten that fee-shifting statutes typically provide that a district court, in its discretion, "may allow the prevailing *party* * * * a reasonable attorney's fee" (42 U.S.C. 1988 (emphasis added)). See, *e.g.*, *Brown* v. *General Motors Corp.*, 722 F.2d 1009, 1011 (2d Cir. 1983) ("Under [42 U.S.C. 1988] it is the prevailing party rather than the lawyer who is entitled to attorney's fees."); *Oguachuba* v. *INS*, 706 F.2d 93, 97 (2d Cir. 1983) (same rule under Equal Access to Justice Act); *White* v. *New Hampshire Dep't of Employment Security*, 629 F.2d at 703 ("award of attorney's fees goes to 'prevailing party,' rather than attorney"); *Smith* v. *South Side Loan Co.*, 567 F.2d 306, 307 (5th Cir. 1978) ("[A]n award [of attorney's fees] is the right of the party suing not the attorney representing him.").

> advance to their clients, and that few clients will against the advice of counsel leap to accept a settlement that deprives counsel of fair compensation and themselves of any provision for costs. In my experience, respected counsel do not and should not undertake public interest representation until an understanding is had with clients as to the range of appropriate settlements. On balance, I do not believe the likelihood that irresolvable problems between counsel and clients may occur is high enough to justify [a per se rule].

In the vast majority of cases, therefore, plaintiffs' lawyers should be able to resolve with their clients any problems associated with simultaneous negotiations. Neither defendants nor the courts need play any role in that process.

F. Judicial Supervision Of Negotiating Practices Should Be Limited To Cases In Which Plaintiffs Are Able To Make A Strong Preliminary Showing Of Bad Faith On The Part Of Defendants

In addition to the usual methods for resolving attorney/client conflicts of interest discussed above, it has been suggested that plaintiffs' counsel may invoke the aid of the district court under Fed. R. Civ P. 16 or 23(e). See, *e.g.*, *Moore* v. *NASD*, 762 F.2d at 1105 n.17 (opinion of MacKinnon, J.); *id.* at 1113 n. 4 (Wald, J., concurring); *Lazar* v. *Pierce*, 757 F.2d at 438. Although we can envision exceptional cases in which that course of action might be appropriate, judicial regulation of settlement negotiating practices as a matter of course strikes us as a "solution" that is likely to create as many difficulties as the "problem."

We are willing to assume that at least in some cases it will be plain that a defendant has no good defense and is using simultaneous settlement negotiations as a tactic to evade a clear statutory attorney's fee obligation. See note 9, *supra*. In such cases, it may be appropriate for the plaintiff to ask the district court to intervene to police the conduct of lawyers appearing before the court.

But a mere allegation by plaintiff's counsel that it is per se improper for a defendant to insist on negotiating the entire case as a package should not be sufficient to entitle the plaintiff to a hearing before the district court. We have already demonstrated that package settlements are *not* inherently unethical and, indeed, they are a necessary component of the public policy favoring the settlement of litigation. Accordingly, we submit that a plaintiff should be required to make a strong preliminary showing of bad faith on the part of the defendant before a district court steps in to supervise the negotiating process. Cf. *Franks* v. *Delaware*, 438 U.S. 154, 171 (1978) ("To mandate an evidentiary hearing, the challenger's attack must be more than conclusory * * *. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.").

We propose this threshold standard because, absent bad faith and unethical conduct, it is simply not the role of the courts to tell parties how to structure their settlement proposals. Moreover, as a practical matter, it seems clear that a district court called upon to review the propriety of particular negotiating tactics could do so only after conducting such a thorough review of the case that the matter might as well be tried instead of settled. For example, the court would have to assess, among other factors, the relative strength of each side's case on the merits in order to determine whether a defendant's settlement offer was made in good faith. This would be akin to the "likelihood of success" inquiry required of a district court ruling on a motion for a preliminary injunction. The judicial resources necessary to make such a determination should not be routinely invoked absent a credible showing that improper behavior is in fact occurring. In addition, the court might be called upon to review in considerable detail "the course of negotiations," but "[r]equiring the district court to inquire into the circumstances of settlement negotiations and to determine who said what to whom when seems a pointless

exercise * * *." *El Club del Barrio, Inc.* v. *United Community Corporations, Inc.*, 735 F.2d at 100.

Finally, Rules 16 and 23(e) of the Federal Rules of Civil Procedure, although theoretically available to resolve ethical disputes, were never intended to address the type of problem presented in this case. The purpose of a "fairness" hearing under Rule 23(e), for example, is to protect the interests of absent class members, not the interests of class counsel. See 3B *Moore's Federal Practice* ¶ 23.80[2.-1] (1985 ed.); *id.* ¶ 23.80[4], at 23-519 to 23-520.[12] And while it is true that Rule 16(a)(5) provides that one of the purposes of a pre-trial conference is to facilitate the settlement of a case, it has never been thought that district courts should intervene in settlement negotiations to the extent of dictating the parties' strategic decisions. Again, therefore, it should be the rare case in which judicial regulation of the settlement process is an appropriate response to the problem perceived by the Ninth Circuit.

II. THE COURT OF APPEALS ERRED IN ORDERING PETITIONERS TO PAY RESPONDENTS' ATTORNEY'S FEES WHILE LEAVING THE REMAINDER OF THE SETTLEMENT "AGREEMENT" INTACT

Even if the court of appeals had correctly determined that "[a]ttorney's fees should not have been a part of the settlement of the claims of the class" (Pet. App. 25a), the court clearly erred in striking the attorney's fee

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[12] For this reason, a Rule 23(e) hearing may well be the proper forum in which to resolve allegations of "sweetheart" deals, in which plaintiffs' attorney's fee is enhanced at the expense of the recovery for the class. Indeed, the Third Circuit's decision in *Prandini, supra,* arose out of just such a concern (557 F.2d at 1020-1021). In the instant case, however, the Ninth Circuit has adopted the Third Circuit's approach to "sweetheart" deals for the wholly distinct purpose of ferreting out "sacrifice" demands. Fairness hearings under Rule 23(e) were never intended for that purpose.

waiver provision from the settlement agreement while leaving the remainder of the agreement intact. Courts have no authority to impose their own notions of a proper settlement on the parties, but that is the effect of the Ninth Circuit's ruling in this case.

As this Court has noted, "[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). Settlement agreements often reflect complex compromises under which the parties "each give up something they might have won had they proceeded with the litigation" (*id.* at 681). For that reason, courts are not free to modify settlement agreements based on their own notions of fairness or proper outcome. *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), slip op. 11-12; *United States* v. *Armour & Co.*, 402 U.S. at 681-682. See also *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970) (NLRB may require employers and employees to negotiate, but it may not compel "agreement" on any substantive provisions of a collective bargaining agreement).

Of particular relevance to this case is the recognition by lower federal courts that a court examining a proposed class action settlement under Fed. R. Civ. P. 23(e) may not selectively strike provisions in the agreement; rather, it must either approve or disapprove the compromise as a whole. See *Officers for Justice* v. *Civil Service Comm'n of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983) ("Neither the district court nor this court is empowered to rewrite the settlement agreement agreed upon by the parties. We may not delete, modify, or substitute certain provisions of the consent decree. Of course, the district court may suggest modifications, but ultimately, it must consider the proposal as a whole and as submitted."); *Moore* v. *NASD*, 762 F.2d at 1109-1110 & n.21 (opinion of MacKinnon, J.); *id.* at 1114 (Wald, J., concurring); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d at 1172; *Cot-*

ton v. *Hinton*, 559 F.2d 1326, 1331-1332 (5th Cir. 1977).

This rule applies *a fortiori* to cases involving simultaneous merits and attorney's fee negotiations. As previously discussed, a defendant in many instances may be willing to settle a case even though he has a strong defense, because he wishes to end the litigation with little or no cost. He may not be willing to settle such a case if he has to pay the plaintiff's attorney's fees. Clearly, this is a choice that only the defendant can make.[13]

Thus, courts should not strike a fee waiver provision alone, leaving the remainder of the settlement intact, in the absence of any evidence that the defendant would have agreed to such a settlement. In this case, the record demonstrates that petitioners would *not* have agreed to the settlement without the waiver-of-fees provision. As the district court noted in explaining its denial of respondents' motion to compel petitioners to comply with the settlement even while the attorney's fee appeal was pending, the settlement agreement was a package deal.[14] The court of appeals' contrary ruling (J.A. 117, 119) was clearly incorrect.

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[13] The rule also holds true even if the court perceives that the defendant has a weak case on the merits and should settle even without a fee waiver. This does not mean that defendants will be able to engage in arguably improper settlement tactics with impunity (see pages 26-27, *supra*). If a court disapproves a proposed settlement because of improper negotiating tactics by the defendant, the defendant will eventually be charged for the time spent by the plaintiff's attorney when an attorney's fee ultimately is awarded. In addition, the court may impose sanctions on defense counsel who have acted unethically, or refer such cases to the appropriate disciplinary bodies. Such measures, which would be directly responsive to the unethical conduct of concern to the court of appeals, surely would deter bad faith offers in the future and would ensure that punishment was imposed on the blameworthy lawyer rather than on his client.

[14] The district court stated (J.A. 115):

> [T]he [petitioners'] signing of the stipulation was dependent upon the Court's approval of the finding that it was appropriate to accept a stipulation where plaintiffs waived attorneys fees.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1985

> The Court made that finding and signed the stipulation. * * * The [petitioners] entered into the stipulation only as a compromise matter with the understanding that they would not pay any attorneys fees, and advised the Court that if there were going to be attorneys fees that they wanted to proceed with trial because they did not think they were required to conform to the stipulation legally. Under those circumstances, it would be entirely inappropriate to leave the stipulation in effect.

See also J.A. 92, 109-110.

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Docket No. 84-1288

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK, and WILLIAM GRUZINSKI,

Petitioners,

v.

JEFF D., PAULA E., JOHN M., AND DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CITY OF NEW YORK, AMICUS CURIAE

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July 18, 1985

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TABLE OF CONTENTS

Page

Table of Authorities i

Interest of the Amicus Curiae 1

Summary of Argument 5

ARGUMENT

THE SIMULTANEOUS NEGOTIATION OF MERITS AND ATTORNEY'S FEES IN CASES BROUGHT PURSUANT TO 42 U.S.C. §1983 DOES NOT VIOLATE THE PROVISIONS OF THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT AND DOES NOT PRESENT THE PLAINTIFF'S ATTORNEY WITH AN IMPROPER CONFLICT OF INTEREST. IN VIEW OF THE POLICY EXPRESSED IN THE FEDERAL RULES OF CIVIL PROCEDURE AND THE DECISIONS OF THIS COURT ENCOURAGING THE SETTLEMENT OF ALL CASES, INCLUDING CIVIL RIGHTS CASES, THE COURT OF APPEALS INCORRECTLY RULED THAT SIMULTANEOUS NEGOTIATIONS IN SUCH CASES IS IMPROPER. 6

Conclusion 21

TABLE OF AUTHORITIES

Page

Cases

Chicano Police Officers Ass'n v. Stover,
624 F.2d 127 (10th Cir. 1980) 15

El Club Del Barrio Inc. v.
United Community Corps.,
735 F.2d 98 (3d Cir. 1984) 17

Gram v. Bank of Louisiana,
691 F.2d 728 (5th Cir. 1982) 14

Grunin v. Int'l House of Pancakes,
513 F.2d 114 (8th Cir.), cert. denied,
423 U.S. 864 (1975) 15

In re Fine Paper Antitrust Litig.,
751 F.2d 562 (3d Cir. 1984) 13

Lazar v. Pierce,
757 F.2d 435 (1st Cir. 1985) 14

Liberty Mutual Insurance Co. v. Ameta & Co.,
564 F.2d 1097 (4th Cir. 1977) 12

Marek v. Chesney,
53 U.S.L.W. 4903 (U.S. June 25, 1985) 7-10

Mendoza v. U.S., 623 F.2d 1338 (9th Cir. 1980)
cert. denied sub nom. Sanchez v. Tucson Unified
School Dist., 450 U.S. 912 (1981) 14

Moore v. Nat'l Ass'n Sec. Dealers
No. 83-2213 (D.C. Cir. June 4, 1985) 17

Prandini v. Nat'l Tea Co.,
557 F.2d 1015 (3d Cir. 1977) 15-17

Shlensky v. Dorsey,
574 F.2d 131 (3d Cir. 1978) 13

Valentino v. Rickners Rhederei, G.m.B.H., 417 F.Supp. 176 (E.D.N.Y. 1976), aff'd, 552 F.2d 466 (2d Cir. 1977) 12

White v. New Hampshire Department of Employment Security, 629 F.2d 697 (1st Cir. 1980), rev'd on other grounds, 455 U.S. 445 (1982) ..... passim

Woodruff v. Woodruff, 176 F.2d 72 (D.C. Cir. 1949) 13

Young v. Powell, 729 F.2d 563 (8th Cir. 1984) 14

Statutes

42 U.S.C. §1983 ..... passim
§1988 ..... passim

Rules

Federal Rules of Civil Procedure

59(e) 6
68 8,9

Other Authorities

District of Columbia Legal Ethics Opinion 147, 113 Daily Washington Law Reporter 389 (February 27, 1983) 19

Model Code of Professional Responsibility EC 2-20 (1979) 12

Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York Opinion No. 80-94, 36 The Record of the Association of the Bar of the City of New York 507 (1981) 3,19

Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York Opinion No. 82-80, New York Law Journal, p.4, Col. 1 (Dec. 9, 1983) 4,18,19

Note, Attorney's Fees: Conflicts Created by the Simultaneous Negotiation of Damages and Statutorily Authorized Attorney's Fees in a Title VII Class Action, 51 Temple Law Quarterly 799 (1978) 16

Note, Settlement Offers Conditional Upon Waiver of Attorney's Fees: Policy, Legal and Ethical Considerations, 131 U.Pa.L. Rev 793 (1983) 16,19

Report of the Subcommittee of Lawyer Members of the Committee on Attorneys' Fees appointed by the Chief Judges of the U.S. District Court and U.S. Court of Appeals for the District of Columbia, Bar Report 4(Aug./Sept., 1984) 19,20

Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183 (1982) 16

State Bar of Georgia Disciplinary Board Opinion 39 (July 20, 1984) 19

IN THE
SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1985

No. 84-1288

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK, and WILLIAM GRUZINSKI,

Petitioners,

v.

JEFF D., PAULA E., JOHN M., AND DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CITY OF NEW YORK, AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The City of New York submits this brief in support of reversal of the judgment of the United States Court of Appeals for the Ninth Circuit. In

the instant case, the Ninth Circuit invalidated a stipulation by which plaintiffs' counsel agreed to waive all claims to attorney's fees to which he was entitled under 42 U.S.C §1988 (the Civil Rights Attorneys Fees Awards Act of 1976) ["Fees Act"]* as a condition of the settlement of a class action brought pursuant to 42 U.S.C. §1983 challenging conditions in Idaho's mental health facilities for children. The Court of Appeals held that absent unusual circumstances, plaintiffs' attorneys in class action civil rights suits should not be forced to choose between their clients' interests and their right to fees. To avoid the "possibility of diverging interests of the lawyer and the class" in such cases, it disapproved of simultaneous negotiation of settlement and attorney's fees.

The City of New York is often a defendant in actions brought pursuant to §1983. In 1984,

*The Fees Act provides that courts "may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" to be paid by the losing party.

approximately 200 §1983 lawsuits were brought against this City. When engaged in settlement negotiations, it is not the policy of the City to avoid discussion of both the merits of the complaint and attorneys' fees. In fact, in many cases which seek damages, we make lump sum offers of settlement which include both damages and fees. An affirmance of the decision of the Ninth Circuit would thus have a significant, adverse impact on determinations by the City to settle because we would be most reluctant to make an offer of monetary settlement without knowing the extent of our liability, including attorneys' fees.

The Ninth Circuit relied in part on an advisory opinion of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, which concluded that it is unethical in civil rights actions for a defendant's counsel — particularly a government defendant — to condition a settlement offer on the waiver of plaintiff's statutory attorneys' fees or to even negotiate the amount of such fees when negotiating

a settlement on the merits. Opinion 80-94. 36 The Record of the Association of the Bar of the City of New York 507 (1981). A substantial minority of the Committee dissented from a subsequent decision not to reconsider Opinion 80-94. Opinion 82-80. New York Law Journal, December 9, 1983 p. 4 col. 1 (and ehtical opinions in many other jurisdictions have reached a contrary conclusion). While we are not bound to adhere to the advisory opinions of the Bar Association, the opinion, and the Ninth Circuit's endorsement of it, do raise serious questions concerning the validity of our present procedures.

Our experience demonstrates that awards of attorneys' fees can be large and in some cases have even exceeded the monetary damages received by a plaintiff. Therefore, the amount of attorneys' fees is a significant factor to be taken into account in determining whether to settle a case. New York City has a substantial interest in the outcome of this case because a rule prohibiting simultaneous negotiation of settlement and fees may result in cases being tried which need not be tried,

unnecessary congestion in the courts, and the utilization of scarce government resources in cases which can and should be settled.

SUMMARY OF ARGUMENT

We urge in our argument that simultaneous negotiation of merits and attorneys' fees in cases brought pursuant to 42 U.S.C. §1983 does not violate the provisions of the Fees Act, nor does it create an impermissible conflict of interest between plaintiff's attorney and plaintiff. Rather, a prohibition on simultaneous negotiation would significantly impair a defendant's ability to settle §1983 cases. In support of that argument, we show that (1) any rule which prohibits the simultaneous negotiation of relief and attorneys' fees is inconsistent with the principle enunciated by this Court that settlement of civil rights cases should be encouraged, not hindered; (2) in terms of ethical considerations, the settlement of civil rights cases should be treated no differently than settlement of other types of actions; (3) a majority of courts and commentators agree that simultaneous negotiation

of merits and fees, and agreed upon reductions or waivers of fees, should not be prohibited by a blanket rule.

ARGUMENT

THE SIMULTANEOUS NEGOTIATION OF MERITS AND ATTORNEY'S FEES IN CASES BROUGHT PURSUANT TO 42 U.S.C. §1983 DOES NOT VIOLATE THE PROVISIONS OF THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT AND DOES NOT PRESENT THE PLAINTIFF'S ATTORNEY WITH AN IMPROPER CONFLICT OF INTEREST. IN VIEW OF THE POLICY EXPRESSED IN THE FEDERAL RULES OF CIVIL PROCEDURE AND THE DECISIONS OF THIS COURT ENCOURAGING THE SETTLEMENT OF ALL CASES, INCLUDING CIVIL RIGHTS CASES, THE COURT OF APPEALS INCORRECTLY RULED THAT SIMULTANEOUS NEGOTIATIONS IN SUCH CASES IS IMPROPER.

It is not inappropriate in a §1983 action for the parties to discuss both relief and/or damages and attorneys' fees when attempting to reach a settlement. This issue was discussed in dictum in White v. New Hampshire Department of Employment Security, 455 U.S. 455 (1982). In White, this Court held that Fed. Rule Civ. Proc. 59(e), which requires that postjudgment applications

be made within ten days of the entry of judgment, was not applicable to postjudgment requests for attorney fees made pursuant to the Fees Act. In support of his position, the petitioner had argued that prejudgment fee negotiations are improper because they create a conflict of interest between the plaintiff and his attorney by requiring them to divide any lump sum settlement offered by the defendant. The Court rejected that contention (455 U.S. 454 n. 15), noting that "a defendant may have good reason to demand to know his total liability from both damages and fees." While recognizing that prejudgment lump sum offers could raise ethical issues, the Court refused "to hold that no resolution is ever available to ethical counsel."

More recently, this Court considered the question of prejudgment settlement offers in Marek v. Chesny, __ U.S. __, 53 U.S.L.W. 4903 (June 25, 1985). In Marek, which involved a lump sum offer of settlement that included attorneys' fees, it was held that a defendant in a §1983 action is not liable for attorneys' fees incurred after a settlement offer if

the judgment is less than the amount offered in settlement. The Court considered the interplay of Fed. Rule Civ. Proc. 68 and the Fees Act. Rule 68 provides that when an offer of settlement is not accepted and the judgment is ultimately not more favorable than the offer, the "offeree must pay the costs incurred after the making of the offer." The respondent had argued that an offer made under Rule 68 must separately recite the amount that is offered to the defendant in settlement and the amount which is intended to cover costs. He contended that a plaintiff could not reasonably make a determination to settle unless the offer was bifucated. The Court rejected this argument that lump sum offers representing both damages and fees are improper, observing at 53 U.S.L.W. 4905:

> "This construction of the Rule [to allow lump sum offers] best furthers the objective of the Rule, which is to encourage settlements. If defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would be reluctant to make settlement offers. As the Court of Appeals observed, 'many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorneys'

fees in whatever amount the Court might fix on motion of the plaintiff.' 720 F.2d at 477."

The Court held that the word "costs" as used in Rule 68 includes attorneys' fees awardable under the Fees Act. It stated that the inclusion of fees as costs under that rule would not frustrate the objective of §1988 to ensure that civil rights plaintiffs obtain effective access to the courts. Id. at 4906. The Court found that Congress had no intention to place civil rights claims "on any different footing from other civil claims insofar as settlement is concerned." Id. at 4906. Marek recognized that both plaintiffs and defendants benefit by policies which encourage the settlement of lawsuits. Some plaintiffs, the Court observed, receive more in settlement than they would receive had they gone to trial, and, in any event, are spared the stress and burdens of litigation. It concluded: "In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants." Id. at 4906.

We respectfully submit that any rule which

prohibits the simultaneous negotiation of relief and attorneys' fees is inconsistent with the principles enunciated in Marek and White. The holding of the Court of Appeals in the instant case discourages rather than encourages the settlement of §1983 cases. It is unreasonable to expect a government to make an offer of settlement which does not represent its total liability, including attorneys' fees. Few attorneys would recommend the settlement of an action if the extent of total liability is unknown.

The adoption of a procedure that encourages trials rather than settlements is, as this Court observed in Marek, harmful to the plaintiffs as well as the defendants. The disincentive to settle would be particularly strong in close cases where the potential damages are relatively small. In such cases, a governement might actually prefer to go to trial on the merits rather than face the possibility of paying an award of attorneys' fees which might be several times larger than the amount paid in damages.

The Ninth Circuit decision would also inhibit the settlement of cases in which equitable relief is sought. Civil rights actions often are brought against a governmental defendant which, as a matter of law, have little likelihood of success. The defendant may be confident that if the matter is fully litigated it will prevail on, for example, jurisdictional grounds. However, as a matter of policy or practical judgment, the defendant may be prepared to dispose of the matter, conditioned upon a waiver or substantial reduction of attorneys' fees. A defendant would not be disposed to settle a case of this nature if its liability for fees must be settled at a later time. Thus, an affirmance of the Ninth Circuit's decision would reduce the number of cases in which plaintiffs obtain relief through settlement.

In terms of ethical considerations, the settlement of a civil rights action should be treated no differently than the settlement of any other type of action. The fact that the plaintiff and his or her attorney must divide a lump sum does not warrant the imposition of a rule banning simultaneous nego-

tiations. Any case in which an attorney's fee depends upon a favorable judgment or settlement presents potential for conflict of interest. However, as this Court observed in White, lump sum offers of settlement are not inherently improper. Prejudgment settlements in contingent fee cases are quite common. Public policy favors the contingent fee as a method for those less financially advantaged to vindicate their rights. See Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097, 1105 (4th Cir., 1977); Valentino v. Rickners Rhederi, 417 F.Supp. 197, 181 (E.D.N.Y., 1976), aff'd, 552 F.2d 466 (2nd Cir., 1977). Indeed, contingent fee arrangements have been endorsed, in part, because "a successful prosecution produces a res out of which the fee can be paid." Code of Professional Responsibility, Ethical Consideration 2-20.

Simultaneous negotiation of damages and attorneys' fees is not uncommon in many other areas of the law, including domestic relations, antitrust, copyright, and stockholder's derivative actions. See

In re Fine Paper Antitrust Litigation, 751 F.2d 562, 583 (3rd Cor., 1984); Shlensky v. Dorsey, 574 F.2d 131, 150 (2rd Cir., 1978); Woodruff v. Woodruff, 176 F.2d (D.C. Cir., 1949).

The opinion below appears to be based upon a misconceived notion concerning the ability of counsel to negotiate settlement of cases in a responsible and ethical manner. There is no reason to presume that, given the rule we urge, attorneys would not act in an ethical manner during settlement negotiations. In any event, the potential for conflict of interest is not so great as to warrant a blanket prohibition against simultaneous negotiations. It is entirely appropriate for an attorney and his or her client to consider counsel fees as a factor in making a determination whether to settle. No attorney is forced to waive or accept a reduced fee which he or she and the client believe is unfair. If a plaintiff and his or her attorney conclude that a settlement offer is inadequate, they may reject it and proceed to trial.

A majority of courts have refused to prohibit

simultaneous negotiation of merits and fees and agreed upon reductions or waivers of fees. The Ninth Circuit has acknowledged that simultaneous negotiation is not inappropriate in all class actions, recognizing that special circumstances may exist which neutralize the potential for impropriety. Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980), cert. denied sub nom., Sanchez v. Tucson Unified School Dist., 450 U.S. 912 (1981). Lazar v. Pierce, 757 F.2d 435, 438 (1st Cir. 1985) ("of course plaintiff's counsed may elect to waive fees," however, it is questionable whether ethically he may agree to waive fees with the intent of challenging the waiver following judicial approval); Young v. Powell, 729 F.2d 563, 566-567 (8th Cir. 1984) (waiver of the right to claim fees in an employment discrimination class action was inferred from the parties' stipulated dismissal of the action with prejudice, the court stating, "there is no reason offered why the parties should not be bound by their agreement under basic principles of contract."); Gram v. Bank of Louisiana, 691 F.2d 728, 730 (5th

Cir. 1982) (a plaintiff may waive his right to attorneys' fees in a negotiated settlement pursuant the Truth in Lending Act); White v. New Hampshire Department of Employment Security, 629 F.2d 697, 705 (1st Cir. 1980) ("nor . . . do we see anything wrong with requiring the parties to face up to the issue of fees in the settlement negotiations"), rev'd on other grounds 455 U.S. 445; Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980) (congress has not prohibited settlements covering payments of attorneys' fees: plaintiffs therefore can waive fees as part of the settlement); Grunin v. International House of Pancakes, 513 F.2d 114, 125 (8th Cir. 1975), cert. den., 423 U.S. 864.

Only one other circuit has adopted a strict rule prohibiting simultaneous negotiation of the merits and of fees. In Prandini v. National Tea Co., 557 F.2d 1015 (1977), the Third Circuit held that in order to avoid the conflict of interest that may result from simultaneous negotiation, settlement of attorneys' fees can occur only after the class damage award for plaintiffs had been settled.

Therefore, the trial court should insist upon two separate settlements. 557 F.2d at 1021.

The Prandini rule completely ignores the defendant's interest in fixing his total liability upon settlement, and thus inhibits the settlement process. This is in contravention of the Third Circuit's own policy favoring private resolution of disputes, noted at 557 F.2d at 1021.*

*The Prandini rule has been criticized by courts and commentators alike. See Attorney's Fees — Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorney's Fees in a Title VII Class Action, 51 Temple Law Quarterly 799, 800, and n. 12. (1978) (a bifurcated settlement procedure ". . . may have undesirable future effects in that the courts will be burdened by an additional judicially supervised proceeding . . . [and] defendants may be deterred from settlement. . . . [T]he bifurcated proceeding may encourage collusion between attorneys in order to effectuate a practical settlement."); Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183, 1207 (1982) (refusal to discuss fees until agreement on all other issues is final "is not necessarily in anyone's interest if it inhibits favorable settlement offers"); Settlement Offers Conditional Upon Waiver of Attorney's Fees: Policy, Legal and Ethical Considerations, 131 U.Pa. L. Rev. 793, 805, n. 90 (1983) (a survey of district court judges in the Third Circuit demonstrates the lack of vitality of the Prandini rule, noting that "some of the judges interviewed suggested that White v. New Hampshire . . . may have modified or overruled Prandini".)

In a recent case, the Third Circuit acknowledged that Prandini may be "more honored in the breach." El Club Del Barrio Inc. v. United Community Corporations, 735 F.2d 98, 101 n. 3 (1984). In discussing simultaneous negotiations, the Court acknowledged that defendants will be unwilling to settle the underlying claim without also resolving counsel fees, which sometimes exceed recovery, and that it would not fulfill the overall goals of the Fees Act to unduly inhibit consensual resolution of disputes.

Most recently, in Moore v. Nat'l Assn. Sec. Dealers, No. 83-2213 (June 4, 1985), the United States Court of Appeals for the District of Columbia declined to follow the approach adopted by the Ninth Circuit in the instant case and the Third Circuit in Prandini.* The Court stated, slip

*The Court considered whether Title VII prohibits a plaintiff from voluntary offering to waive attorney's fees and cost during simultaneous negotiation of merits, fees and costs. The Court did not decide the issue whether defendants may make settlement offers which encompass both merits and fees, but noted that "...it does not appear that plaintiff's counsel is without ability to avoid [this] potential ethical dilemma." (slip. op. at 2).

op. at 23:

> To adopt the Third Circuit rule would deprive Title VII plaintiffs of this right to waive their statutory fees and costs and force them to negotiate first and exclusively on the merits of the case. Defendants in such cases would be more reluctant to settle at this early stage because of uncertainty about their ultimate liability for attorneys' fees and costs. As a result, many more cases would fail settlement and proceed to trial. Thus, a requirement in every case that merits be discussed and settled first would prove ultimately a disservice to plaintiffs as well as defendants.

Above we noted that the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York issued an opinion, over a strong dissent, which concluded that a negotiation of attorneys' fees, prior to a settlement on the merits is inappropriate. For the reasons stated above, we believe that the views expressed in that opinion are incorrect. Rather, we agree with the dissent in Opinion 82-80, that this prohibition is itself "prejudicial to the proper administration of justice", and interferes with the right of defendant to know his exposure, and to insist, if he wishes, on a lump sum settlement

inclusive of attorneys' fees. We note in addition that Opinion 80-94 has not been followed by other bar associations. The State of Georgia Disciplinary Board was persuaded by the dissent in New York City Bar Association Opinion 82-80. Opinion 39 (July 20, 1984); accord Report of the Subcommittee of Lawyer, Member of the Committee on Attorneys' Fees appointed by the Chief Judges of the U.S. District Court and U.S. Court of Appeals for the District of Columbia, Bar Report 4 (Aug/Sept., 1984); see District of Columbia Bar Legal Ethics Committee Opinion 147, 113 Daily Washington Law Reporter 389 (February 27, 1983). Finally, Opinion 80-94 has been rejected by commentators, most notably by the University of Pennsylvania Law Review, 131 U. Pa. L. Rev. at 811-813.

We believe that a proper interpretation of 42 U.S.C. §§1983 and 1988 and the relevant cases support the view that there is no inherent conflict between plaintiffs and their attorneys when merits and fees are negotiated simultaneously. The essential question is whether defendant's conduct is

reasonable in light of all the circumstances, including the chances of success on the merits and the risk of possible exposure in damages and attorney fees. In making such determinations, the legitimate interests of the plaintiff and his or her counsel must be balanced against the legitimate interest of the defendant in making an offer which will fix liability with considerable certainty. As set forth by the District of Columbia Subcommittee on Attorneys' Fees, supra:

> "This balancing approach applies regardless of whether the issue is phrased in terms of the right of the defendant to make a lump sum settlement offer, or the right to refuse to pay fees to the plaintiff's attorney while providing some measure of relief to the client."

A rule preventing a full exchange of views in the settlement process will encourage protracted and unnecessary litigation in many instances where justice would be served by simultaneous airing of merits and fees.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED.

July 18, 1985.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1985

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK, and WILLIAM GRUZINSKI,
Petitioners,

v.

JEFF D., PAULA E., JOHN M., and DUSTY R., minors, by and through their next friend, CHARLES JOHNSON, III, individually and on behalf of the class they represent and MARK CLARY, intervenor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether settlement negotiations on the merits of a civil rights action can include simultaneous negotiation of attorney's fees.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. SIMULTANEOUS NEGOTIATION OF ATTORNEY'S FEES WITH THE MERITS IS THE MOST EFFECTIVE MEANS OF ACHIEVING PROMPT AND JUST SETTLEMENT OF CIVIL RIGHTS LITIGATION	5
II. THIS COURT'S CASES RECOGNIZE THE IMPORTANCE OF SETTLEMENTS THAT INCLUDE ALL ASPECTS OF LIABILITY	7
III. SIMULTANEOUS NEGOTIATIONS FURTHER THE GOALS THAT THE FEE-SHIFTING PROVISIONS OF THE CIVIL RIGHTS LAWS INTENDED TO PROMOTE	10
A. Congress Did Not Intend to Make Attorney's Fees Nonnegotiable	10
B. Simultaneous Negotiations Promote the Purposes and Policies of the Civil Rights Laws	11
1. Vigorous Enforcement of the Civil Rights Laws	11
2. Ease of Judicial Administration	13

TABLE OF CONTENTS—Continued

Page

IV. DEFENSE COUNSEL'S ETHICAL OBLIGATIONS TO THEIR CLIENTS AND TO THE ADMINISTRATION OF JUSTICE ARE BEST MET BY ENSURING THAT SETTLEMENTS RESOLVE THE AMOUNT OF FEES AS WELL AS THE ISSUE OF DAMAGES 14

A. Simultaneous Negotiations Further the Client's Interests and the Administration of the Adversary System 14

B. Bifurcated Negotiations Are Inefficient and Do Not Eliminate the Potential for Conflicts of Interest 17

C. Current Law Provides Ready Solutions to Any Potential Ethical Conflict 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES — Page

Blum v. Stenson, —— U.S. ——, 104 S.Ct. 1541 (1984) 8
Carson v. American Brands, Inc., 450 U.S. 79 (1981) 9
Chicano Police Officer's Association v. Stover, 624 F.2d 127 (10th Cir. 1980) 7
Chrapliwy v. Uniroyal, Inc., 509 F. Supp. 442 (N.D. Ind. 1981), *aff'd in part and rev'd in part*, 670 F.2d 760 (7th Cir. 1982), *reh'g and reh'g en banc denied* (April 13, 1982), *cert. denied*, 461 U.S. 956 (1983), *on remand*, 583 F. Supp. 40 (N.D. Ind. 1983) 13-14
Gram v. Bank of Louisiana, 691 F.2d 728 (5th Cir. 1982) 7
Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975) 11
Hensley v. Eckerhart, 461 U.S. 424 (1983) 6, 8, 9, 13
Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985) 7, 12, 16
Maher v. Gagne, 448 U.S. 122 (1980) 5
Marek v. Chesny, No. 83-1437 (U.S. June 27, 1985) 5, 6, 7, 9, 12
Moore v. National Association of Securities Dealers, Inc., 762 F.2d 1093 (D.C. Cir. 1985) .....*passim*
Parker v. Califano, 411 F. Supp. 1059 (D.D.C. 1976), *aff'd*, 561 F.2d 320 (D.C. Cir. 1977), *on remand*, 443 F. Supp. 789 (D.D.C. 1978) 14
White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982) 8, 9, 14

STATUTES

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 .....*passim*
Title VII, 42 U.S.C. § 2000e-5(k) .....*passim*

RULES

Rule 16, Fed. R. Civ. P. 19
Rule 23, Fed. R. Civ. P. 19
Rule 68, Fed. R. Civ. P. 7

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page

Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U. Pa. L. Rev. 793 (1983) 15, 17, 18
H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 5, 10, 11
G. Hazard, *Ethics in the Practice of Law* (1978) 17
A. Miller, *Attorneys' Fees in Class Actions* (1980) .. 18
Model Code of Professional Responsibility (1981) .. 13, 14, 15, 17, 19
Model Rules of Professional Conduct (1983) .. 14, 15, 17, 19
J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* (2d ed. 1985) .. 18
Opinion No. 147, The District of Columbia Bar Legal Ethics Committee, *reprinted in* 113 The Daily Washington Law Reporter 389 (1985) 15
Opinion No. 80-94, Committee on Professional and Judicial Ethics of the Bar Association of the City of New York, *Settlement Offers in Public Interest Litigation Conditional on Waiver of Statutory Fees, reprinted in* 36 Record of B.A.C. N.Y. 507 (1981) 15
Report of the Subcommittee of Lawyer Members of the Committee on Attorney Fees appointed by the Chief Judges of the United States District Court and the United States Court of Appeals for the District of Columbia, *reprinted in* Bar Report, Aug./Sept. 1984, p. 4 16
Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183 (1982) 15
S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 5 U.S. Code Cong. & Ad. News 5908 (1976) 10, 11

IN THE

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OCTOBER TERM, 1985

No. 84-1288

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK, and WILLIAM GRUZINSKI,
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INTEREST OF THE *AMICI* [1]

Amici are organizations whose members include state, county, and municipal governments and officials located throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

and responsibilities of such governments. This case presents an issue of great importance concerning the ability of these governments and their officials to make settlement offers to plaintiffs in civil rights litigation.

The court below ruled that simultaneous negotiation of attorney's fees and the merits should only be permitted "on a showing of unusual circumstances." Pet. App. 24a. Under such a rule, state and local governments and officials, as defendants in civil rights litigation, simply could not, in the vast majority of cases, determine the full extent of their liability through settlement negotiations. As a result, many cases that are currently settled out of court could no longer be resolved voluntarily, and both litigants and courts would be put to the unnecessary expense and demands of trials that should be avoided.

Because of the importance of this ruling to state and local governments and officials, *amici* submit this brief to assist the Court in its resolution of the case.

STATEMENT OF THE CASE

Petitioners, as defendants in a class action filed by respondents under 42 U.S.C. § 1983, engaged in extensive negotiations to reach a settlement. Petitioners conditioned the settlement on a waiver of respondents' attorney's fees. The final settlement agreement provided that "plaintiffs and defendants should each bear their own costs and attorney's fees thus far incurred, if so approved by the court." Pet. App. 10a. The district court approved the settlement.

The court of appeals reversed. The court held that respondents had improperly been required to waive the attorney's fees ordinarily available to civil rights plaintiffs, and then went on to rule that, in the absence of unusual circumstances, attorney's fees have no place in settlement negotiations. The court remanded the case to the district court for a determination of reasonable attorney's fees for respondents. Pet. App. 25a.

SUMMARY OF ARGUMENT

1. All of the major civil rights statutes allow the district court, in its discretion, to award attorney's fees to the prevailing party. A plaintiff who achieves substantial relief through settlement negotiations may be a prevailing party. Only through simultaneous negotiation of both the merits of plaintiff's claim and the plaintiff's attorney's fees can a defendant know the full implications of a settlement agreement into which it may consider entering. The alternative to simultaneous negotiation is a bifurcated procedure in which the question of fees is put aside for later negotiation or litigation after the merits are resolved. Because such a procedure leaves the defendant unsure about the total potential financial liability incurred under the settlement, the bifurcated procedure discourages settlement.

2. This Court's recent cases have stressed the importance of settlement of claims, including those for attorney's fees. These cases fully resolve the legal, policy, and ethical questions potentially arising from simultaneous negotiations of the merits and the attorney's fees.

3. Limiting the negotiability of attorney's fees would frustrate Congress' intent to improve enforcement of the civil rights laws. Nothing in the legislative history of the many civil rights statutes that authorize fee-shifting indicates that Congress intended to provide prevailing plaintiffs with an inalienable right to attorney's fees. Indeed, while some other fee-shifting statutes *require* that fees be awarded to the prevailing party, the civil rights fee-shifting statutes typically provide only for discretionary awards of fees. In addition, Congress made clear that the authorization of awards of attorney's fees was part of its overall effort to further the goals of civil rights legislation. Precluding simultaneous negotiations, however, would reduce the frequency of settlements and could diminish the amount of substantive relief afforded to plaintiffs in settlements, as well as increase the cost

and burden of enforcement and administration of the civil rights laws.

4. By including fees with all other elements of a claim during settlement negotiations, defense counsel meet their ethical obligations both to their clients and to the administration of justice. Attorneys owe a positive duty to their clients to reduce the clients' liability and risk of liability. By securing prompt resolution of the question of attorney's fees, simultaneous negotiations also serve the attorney's complementary duty of promoting the administration of justice. Settlements are encouraged, and the defendant is able to offer more substantive relief when its concern about potential fee liability is allayed. The ideal of autonomy on which the adversary system is based is also best achieved by assuring that clients have full knowledge of all terms of a proposed settlement.

5. The alternative to simultaneous negotiations is bifurcated negotiations. In addition to their obvious inefficiencies, bifurcated negotiations depend at least in part on the hidden discussion of those issues that are openly discussed in simultaneous negotiations. Thus, technically bifurcated negotiations fail to achieve even the minimal objective of avoiding simultaneous negotiation in fact. Moreover, bifurcated negotiation puts the court in a poorer position to review the fee award and provide meaningful relief to the plaintiff because the court does not have the facts of the case before it when it reviews the fee agreement.

6. Effective measures available to prevent or correct any prejudice to the plaintiff that might result from a conflict of interest include discussions and agreements between the attorney and the client; guidance from the court; and, if necessary, remedial action by the court. Moreover, to the extent that the problem is an ethical, and not a legal, one, its prevention and remediation lie in disciplinary measures by the bar, not a legal ruling by this Court.

ARGUMENT

I. SIMULTANEOUS NEGOTIATION OF ATTORNEY'S FEES WITH THE MERITS IS THE MOST EFFECTIVE MEANS OF ACHIEVING PROMPT AND JUST SETTLEMENT OF CIVIL RIGHTS LITIGATION

The narrow question presented to the court of appeals for review in this case was the propriety of defendant's insistence on a waiver of plaintiffs' attorney's fees as a condition of settlements. *Amici* take no position with respect to this issue. The court of appeals, however, went beyond that issue to formulate a broad rule precluding simultaneous negotiation of the amount of attorney's fees with discussion of settlement on the merits. It is this general rule that *amici* ask this Court to repudiate, because it serves neither the interests of the plaintiff nor those of the defendant in fixing reasonable attorney's fees; undercuts the intention of Congress and good judicial administration by discouraging settlements; and does not resolve the ethical problems faced by plaintiffs' attorneys in fee negotiations.

All major civil rights statutes allow the district court, in its discretion, to award attorney's fees to the "prevailing party." *See, e.g.*, 42 U.S.C. § 1988 (Civil Rights Attorney's Fees Awards Act of 1976; hereinafter "the Fees Act"); 42 U.S.C. § 2000e-5(k) (Title VII). In *Maher v. Gagne*, 448 U.S. 122 (1980), this Court held that a plaintiff who obtains relief through settlement rather than litigation is eligible to recover attorney's fees. The value of this policy to plaintiffs is that they need not be reluctant to settle a case simply to ensure recovery of attorney's fees. "Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court." *Marek v. Chesney*, No. 83-1437, slip op. at 8 (U.S. June 27, 1985), *citing* H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976).

The policy of allowing plaintiffs to recover attorney's fees even if they settle their claims must be reconciled with defendants' need to know the full extent of liability at settlement. In a system of simultaneous negotiation of the merits and attorney's fees, all items of the relief sought are on the table at the same time.[2]

The alternative to simultaneous negotiation is a bifurcated procedure in which the question of attorney's fees is not discussed until after agreement has been reached on all other elements of the claim. At that point, attorney's fees could be negotiated by the parties or, more likely, awarded by the court. This Court has noted that "[t]here is no precise rule or formula for making these determinations [of attorney's fees]." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Thus, without simultaneous negotiations a defendant will be unsure of its total liability even after it has agreed to settle all other items of a plaintiff's claim.

Amici's members, frequent defendants in civil rights litigation, have a strong interest in fair and timely settlement of all legitimate claims brought under the civil rights laws. *Amici* believe that the settlement mechanism enables both plaintiffs and state and local government defendants to achieve the outcome that is most efficient in terms of time and money. As the Court recently stated: "[i]n short, settlement rather than litigation will serve the interests of plaintiffs as well as defendants." *Marek, supra*, slip op. at 8. *Amici* believe that the simultaneous negotiation of the merits of a case and the appropriate attorney's fee, the route precluded by the

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[2] The attorney's fee component of a settlement resulting from simultaneous negotiations can take many forms. Plaintiff may accept a lump-sum settlement, agree to a "cap" on the amount of attorney's fees, or forgo attorney's fees. *Amici* do not believe that valid legal distinctions can be drawn among these various forms, nor can they be firmly separated in practice. Accordingly, our argument applies to any form of fee component except where noted.

Ninth Circuit, is the best way to promote such settlements. The monetary exposure that remains after the merits portion of a bifurcated negotiation procedure is unacceptable because it will make defendants reluctant to settle. Only a system that produces certainty and eliminates further risk of liability will promote settlements, the method of resolving litigation that is preferred by courts, by Congress, and by *amici*. As we discuss below, this Court's cases, the legislative history of the Fees Act, and the relevant ethical considerations all favor simultaneous negotiation of the merits and attorney's fees in civil rights cases.

II. THIS COURT'S CASES RECOGNIZE THE IMPORTANCE OF SETTLEMENTS THAT INCLUDE ALL ASPECTS OF LIABILITY

The decision of the court of appeals is irreconcilable with this Court's approach to the settlement of attorney's fee awards. *Amici* suggest that several recent opinions resolve the legal, policy, and ethical considerations surrounding simultaneous negotiations.

Marek v. Chesny did not specifically concern the simultaneous negotiation of damages and attorney's fees, but the opinion makes clear that this is the procedure that the Court envisioned.[3] *Marek* held that, under Fed. R. Civ. P. 68, a defendant is not liable for attorney's fees incurred by a plaintiff subsequent to an offer of settlement by the defendant. In holding that an offer of judgment need not separately indicate proposals for damages

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[3] Even without the benefit of this Court's opinion in *Marek*, several courts of appeals have held, as *amici* urge, that simultaneous negotiation of the merits and fees is permissible. *See Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093 (D.C. Cir. 1985); *Lazar v. Pierce*, 757 F.2d 435 (1st Cir. 1985); *Gram v. Bank of Louisiana*, 691 F.2d 728, 730 (5th Cir. 1982) (dictum); *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 132 (10th Cir. 1980).

and for costs, the Court chose the "construction of the Rule [that] best furthers the objective of the Rule, which is to encourage settlements." Slip op. at 4. As the Court explained:

> If defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff."

Ibid. (citation omitted).[4]

Similarly, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Court considered a challenge to an attorney's fee awarded following litigation over conditions at a state hospital.[5] The Court noted that "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Id.* at 437.[6] Although the Court in *Hensley* did not discuss the procedure for settlement of attorney's fees, it is clear that such a settlement will be facilitated when it is considered at the same time as the merits of

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[4] *See also White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445, 454 n.15 (1982): "In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees."

[5] *Hensley* held that if the district court awards fees, "the extent of a plaintiff's success is a crucial factor in determining the amount" of those fees. 461 U.S. at 440.

[6] *See also Blum v. Stenson*, —— U.S. ——, 104 S.Ct. 1541, 1550 n.19 (1984) ("Parties to civil rights litigation in particular should make a conscientious effort where a fee award is to be made, to resolve any differences.").

the case. First, defendants who settle the merits of a case have an interest in settling the amount of any attorney's fee in order to know the full extent of their liability in the case. As the Court noted in *Marek*, defendants are understandably reluctant to settle without such knowledge. Second, defendants who settle the merits of a case without resolution of the fee award risk "major litigation" over the fee award. Even if it is the first and not the "second major litigation" of a case, defendants will be similarly reluctant to settle in such circumstances. The best way to promote the policy articulated in *Hensley* is simultaneous settlement of both the merits of a case and the fee award.[7]

In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), the Court discussed the contention that "prejudgment fee negotiations could raise an inherent conflict of interest between the attorney and client." *Id.* at 453-54 n.15.[8] The Court decisively rejected the rule adopted by the court below in this case: the sweeping proposal that "to avoid this conflict of interest any fee negotiations should routinely be deferred until after the entry of a merits judgment." *Id.* at 454 n.15. The Court stated: "Although such [prejudgment fee negotiations] situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant

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[7] *See Carson v. American Brands, Inc.*, 450 U.S. 79, 87 (1981): "Settlement agreements may . . . be predicated on an express or implied condition that the parties would, by their agreement, be able to avoid the costs and uncertainty of litigation."

[8] In *White*, the Court held that a post-judgment request for attorney's fees is not a "motion to alter or amend the judgment" subject to the requirement in Fed. R. Civ. P. 59(e) that such motions must be served not later than ten days after the entry of judgment. The Court noted that a request for attorney's fees "raises legal issues collateral to the main cause of action." 455 U.S. at 451.

to hold that no resolution is ever available to ethical counsel."

Accordingly, *amici* suggest that this Court has already considered the legal, policy, and ethical issues presented, and that its conclusions require reversal of the ruling below.

III. SIMULTANEOUS NEGOTIATIONS FURTHER THE GOALS THAT THE FEE-SHIFTING PROVISIONS OF THE CIVIL RIGHTS LAWS INTENDED TO PROMOTE

A. Congress Did Not Intend to Make Attorney's Fees Nonnegotiable

Congress has indicated that a prevailing plaintiff in civil rights litigation "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." S. Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 5 U.S. Code Cong. & Ad. News 5908, 5912 (1976) (hereinafter "Senate Report").

The legislative history of the civil rights fee-shifting statute does not specifically discuss the practice of simultaneous negotiations. At the time that the Fees Act was passed, however, Congress was well aware of over fifty provisions for attorney's fees in a wide variety of statutes. *See* H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976) (hereinafter "House Report"). Prior to that time, no court had ever held that any of these other fee-shifting statutes precluded simultaneous consideration of the merits and attorney's fees during settlement negotiations. The Senate Report makes quite clear that the Fees Act "creates no startling new remedy" and should be "governed by the same standards which prevail" in other statutes which utilize "the traditionally effective remedy of fee-shifting." Senate Report at 6. Against this background, no limitation on the negotiability of attorney's fees may be inferred from congressional silence on this subject in the legislative history of the Fees Act.

In addition, the House Report notes, at p. 4, that Congress has differentiated among four types of fee-shifting statutes: (1) mandatory awards only for a prevailing plaintiff; (2) mandatory awards for any prevailing party; (3) discretionary awards for a prevailing plaintiff; and (4) discretionary awards for any prevailing party. The civil rights fee statutes are in the last category. The Report makes clear that this choice was purposeful: "Congress has passed many statutes *requiring* that fees be awarded to a prevailing party. Again the committee adopted a more moderate approach here . . . ." *Id.* at 7 (emphasis in original). Even statutes that provide for mandatory awards of attorney's fees have never been interpreted to restrict the negotiability of fees. *See, e.g., Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975) (settlement of a claim under the Clayton Act, which requires payment of attorneys' fees to the prevailing plaintiff, included provision setting amount of fees). *A fortiori*, discretionary fee awards should be open to discussion at settlement negotiations on the merits.

B. Simultaneous Negotiations Promote the Purposes and Policies of the Civil Rights Laws

Fee-shifting provisions seek to ensure "vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy." Senate Report at 4. Simultaneous negotiations promote these purposes and policies. Enforcement is fostered through the prompt, full settlement of legitimate claims; and the courts are spared the burden of trials that would become necessary if simultaneous negotiations were prohibited.

1. *Vigorous Enforcement of the Civil Rights Laws*

This Court has recently noted that "[t]here is nothing incompatible" between the objectives of "encourag[ing] settlements" and "encourag[ing] plaintiffs to bring meri-

torious civil rights suits." *Marek v. Chesney*, No. 83-1437, slip op. at 9 (U.S. June 27, 1985). Similarly, one court of appeals recently pointed out, in the context of a Title VII case, that the concept of the "private attorney general" must be balanced against the equally important policy of encouraging settlement of civil rights cases. That court, remarking on the similarity of the attorney's fees provision of Title VII to the Fees Act, relied on the legislative history and judicial interpretation of that Act to hold that simultaneous negotiation of merits, fees, and costs should not be prohibited completely. *See Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093, 1094, 1097 n.7, 1099, 1104, 1106 (D.C. Cir. 1985).[9]

Simultaneous negotiations, in fact, may lead to monetary settlements that are more generous to the plaintiff, because a defendant certain about the total liability will not feel the need to reduce the settlement offer on the merits to provide a cushion for later payment of attorney's fees. In addition, where a fee award is part of a lump-sum settlement resulting from simultaneous negotiations, a reduction in the fee request by plaintiff's attorney could result in additional compensation to the plaintiff. By contrast, a post-settlement reduction by the court in the fees requested by plaintiff's counsel can accrue only to the benefit of the defendant.

There is no reason to fear that allowing simultaneous negotiations will act as a disincentive to plaintiffs' at-

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[9] The court also held that in certain circumstances the plaintiff may voluntarily waive claims to statutory fees and costs. *Accord Lazar v. Pierce*, 757 F.2d 435, 438 (1st Cir. 1985) ("Of course plaintiff's counsel may elect to waive [fees]."). A concurring opinion noted that "if constitutional rights can consciously be waived by a defendant in a criminal case, it would be an excess in paternalism to conclude that parties to a civil dispute cannot do likewise." *Id.* at 439 (Torruella, J., concurring) (footnote omitted).

torneys in civil rights cases. First, as the court of appeals noted in *Moore*, the mere practice of simultaneous negotiation does not determine whether a fee will be awarded or the amount of the fee; those issues are determined by the strength of the plaintiff's case. *See Moore*, 762 F.2d at 1105, 1110. Plaintiffs' attorneys generally evaluate these factors prior to filing suit. *See, e.g., Model Code of Professional Responsibility*, DR 2-109 (hereinafter "*ABA Code*"). Second, even if a negotiated fee were less than a court might award in certain cases, plaintiffs' attorneys who settle rather than litigate are able to conserve their time and thus a lower attorney's fee may adequately compensate them for their services.

2. *Ease of Judicial Administration*

In the absence of simultaneous negotiation and settlement of the merits and attorney's fees, the courts would be forced to resolve at trial the merits of civil rights claims which defendants cannot settle because they cannot agree on attorney's fees. In addition, the amount of fees would then have to be determined by the court. Under a settlement encompassing both the merits and attorney's fees, the court would, of course, retain ultimate supervisory authority over the fee award. The burden on the court, however, would be significantly less if the parties have first negotiated the amount of the fee than if the court must itself preside over a mini-trial on the question of fees. *Cf. Hensley v. Eckerhart*, 461 U.S. at 437 ("[A] request for attorneys' fees should not result in a second major litigation."). In many cases, moreover, the burden and costs of the litigation over fees far exceed those of a resolution of the merits. *See, e.g., Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442 (N.D. Ind. 1981), *aff'd in part and rev'd in part*, 670 F.2d 760 (7th Cir. 1982), *reh'g and reh'g en banc denied* (April 13, 1982), *cert. denied*, 461 U.S. 956 (1983), *on remand*,

583 F. Supp. 40 (N.D. Ind. 1983); *Parker v. Califano*, 411 F. Supp. 1059 (D.D.C. 1976), *aff'd*, 561 F.2d 320 (D.C. Cir. 1977), *on remand*, 443 F. Supp. 789 (D.D.C. 1978). Thus, to the extent that simultaneous negotiations can avoid or simplify fee litigation, such negotiations will further the congressional purposes and policies of the civil rights laws, as disclosed in the legislative history.

IV. DEFENSE COUNSEL'S ETHICAL OBLIGATIONS TO THEIR CLIENTS AND TO THE ADMINISTRATION OF JUSTICE ARE BEST MET BY ENSURING THAT SETTLEMENTS RESOLVE THE AMOUNT OF FEES AS WELL AS THE ISSUE OF DAMAGES

This Court has noted that simultaneous negotiation "may raise difficult ethical issues for a plaintiff's attorney." *White v. New Hampshire Department of Employment Security*, 455 U.S. at 454 n.15. *Amici* also recognize that such issues may arise. But just as the Court was "reluctant to hold that no resolution is ever available to ethical counsel," (*ibid.*), *amici* submit that simultaneous negotiations are not only permissible but should be encouraged. Safeguards exist to prevent unfairness to the plaintiff; the prohibition of simultaneous negotiations is not necessary. Moreover, ethical considerations also plague bifurcated negotiations. In fact, such negotiations may present additional ethical problems for plaintiff's counsel. Thus, the better reasoned opinions from both courts and bar associations agree that ethical counsel may engage in simultaneous negotiations with care.

A. Simultaneous Negotiations Further the Client's Interests and the Administration of the Adversary System

Neither the *ABA Code* nor the *Model Rules of Professional Conduct* (hereinafter "*Model Rules*") addresses whether simultaneous negotiations are permissible. Although commentators have generally held opinions as divergent as those of the circuit courts on this issue,

all seem to agree that the *ABA Code* and the *Model Rules* do not support a condemnation of simultaneous negotiations. *See* Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Leyal, and Ethical Considerations*, 131 U. Pa. L. Rev. 793, 812 (1983); Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183, 1208 (1982).

State bar ethics committees have generally not prohibited simultaneous negotiations. The District of Columbia Bar Legal Ethics Committee, for instance, was

> not prepared to find that offers of a single sum by a defendant in settlement of [civil rights] litigation is unethical. Society's interest in encouraging disposition of these and other cases through compromise, and a defendant's legitimate interest in defining his liability by settlement in lieu of trial, both require that this type of offer should be encouraged, not hindered.

Opinion No. 147, The District of Columbia Bar Legal Ethics Committe, *reprinted in* 113 The Daily Washington Law Reporter 389, 394 (1985).[10] Similarly, a subcom-

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[10] The Legal Ethics Committee did conclude that the defendant may not condition an offer of settlement upon an agreement by plaintiff's counsel to waive or limit attorney's fees. The Bar Association of the City of New York apparently agrees. *See* Opinion No. 80-94, Committee on Professional & Judicial Ethics of the Bar Ass'n of the City of New York, *Settlement Offers in Public Interest Litigation Conditional on Waiver of Statutory Fees, reprinted in* 36 Record of B.A.C.N.Y. 507 (1981).

The distinction between a waiver by the plaintiff and a demand for waiver by the defendant also received consideration in *Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093 (D.C. Cir. 1985). There, the court held that simultaneous negotiations should not be completely prohibited and that plaintiffs may voluntarily waive attorney's fees if they do so without a demand by the defendant. The court did not decide whether defense counsel could raise the issue by making a settlement offer that encompassed both the merits and an attorney's fee. *See id.* at 1105, nn.17, 18. The dissent found the distinction be ween plaintiff-suggested waiver

mittee appointed by the chief judges in the District of Columbia emphasized that defendants' settlement offers that include fee provisions are usually not motivated by a desire to create attorney-client conflicts or to bulldoze plaintiffs' attorneys into accepting inadequate fees. Rather, defense counsel act to further their clients' interests in defining their total exposure. Noting that "the legitimate interest of the fee shifting provisions must be balanced against the legitimate interest of the defendant . . . in making an offer which will fix liability with considerable certainty," the subcommittee concluded that "the simultaneous settlement of fee disputes does not necessarily create an impermissible conflict of interest." [11]

As these materials suggest, defense counsel's affirmative duty to represent their clients' interests zealously may *require* counsel to raise the fee issue in settlement negotiations.[12] This duty to their clients complements

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and defendant-coerced waiver to be illusory. *See id.* at 1114 (Wright, J., dissenting). The dissent, therefore, would have prohibited simultaneous negotiations altogether. *Amici* agree that the process of negotiation may make it difficult at times to distinguish offers from demands or to identify exactly where and when an offer originated. But the solution is not to prohibit all simultaneous negotiations, but to allow them subject to appropriate review by the court of the settlement reached.

[11] Report of the Subcommittee of Lawyer Members of the Committee on Attorney Fees appointed by the Chief Judges of the United States District Court and United States Court of Appeals for the District of Columbia, *reprinted in* Bar Report, Aug./Sept. 1984, p. 4, at p. 6.

[12] Judge Torruella, concurring in *Lazar v. Pierce*, 757 F.2d 435, 439 (1st Cir. 1985), recently concluded:

> A settlement package of a civil rights action may consist of one or more of the following items: (1) monetary damages, (2) equitable relief, (3) costs, and (4) attorney's fees. In settling a case for his client, a defendant's counsel does his client a disservice if he settles a case as to one or more of these items, but leaves open the possibility of further recovery or action on any of the remaining ones. Within the bounds of ethics and

their obligation to further the administration of justice. Even a critic of simultaneous negotiations conceded that such negotiations "arguably promot[e] the administration of justice if the relief offered by the defendant to the plaintiff terminates a violation of a civil rights statute." Comment, *Settlement Offers*, *supra*, 131 U. Pa. L. Rev. at 811.

Finally, much of the "real value of the adversary system" lies in "its contribution to the ideal of individual autonomy." G. Hazard, *Ethics in the Practice of Law* 129 (1978). Both the *ABA Code* and the *Model Rules* are careful to reserve to the client the authority to make final decisions affecting the nature of a settlement. *See, e.g.*, *ABA Code*, EC 7-7, 7-8; *Model Rules*, Rule 1.2. Yet, typically, civil rights plaintiffs have very little say about the day-to-day progression of their action. A plaintiff cannot make an intelligent decision to accept or reject a proffered settlement without knowledge of the amount of attorney's fees that may ultimately be negotiated or awarded. Encouraging simultaneous negotiations will best serve the interests of the client, the administration of justice, and the adversarial system.

B. Bifurcated Negotiations Are Inefficient and Do Not Eliminate the Potential for Conflicts of Interest

Bifurcated negotiations are inefficient for two reasons. First, although perceived as a way of preventing simultaneous negotiation of the merits and attorney's fees, in fact they may not do so. So-called bifurcated negotiations of the merits in cases for which attorney's fees are authorized by statute do not occur in a vacuum; the parties are fully aware that a claim for attorney's fees will follow. Because defendants must have some sense of their total potential liability, the lurking issue of at-

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fair play, an attorney owes a positive duty to his client to reduce his liability and his exposure to recovery to the limits of the attorney's ability. This applies to all the items as to which judicial relief can be sought.

torney's fees may affect the negotiation of the merits even if the fees are not explicitly discussed.

Thus, in a sense, all settlement negotiations are simultaneous negotiations. One court has noted that a bifurcated rule "would be difficult to enforce since it is not always possible to determine when the parties violate the rule and engage in informal discussions on fees." *Moore*, 762 F.2d at 1101 n.13.[13] Prohibiting simultaneous negotiations therefore is not an effective solution to the ethical problems presented by such negotiations.

Second, bifurcated negotiations produce two agreements, rather than one, for the court to review. In addition to placing additional demands on the court's time, such a procedure detracts from the quality of judicial review of settlements. Because the court does not have the entire settlement agreement before it, it has less opportunity to become aware of and to correct any prejudice to the plaintiff that might have resulted from a conflict of interest between attorney and client.[14]

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[13] Interviews with district court judges in the Third Circuit, which is widely supposed to require bifurcated negotiations, reveal that "exchanges of information" are even encouraged. *See* Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U. Pa. L. Rev. 793, 804-805, n.90 (1983). As has been noted, "[i]t sometimes will be difficult to distinguish this type of information exchange from an informal agreement." A. Miller, *Attorneys' Fees in Class Actions* 223 (1980). Hence, "the net result [of requiring bifurcated negotiations] might be to increase informal agreements among counsel or to encourage withholding agreements on fees from the judge until after the settlement is approved." *Id.* at 222.

[14] One commentator has noted with respect to the settlement of class action litigation, that "[o]nly if the aggregate of all payments to be made by defendant is disclosed in the proposed settlement can the class members and the court make any intelligent judgment about the fairness and reasonableness of a proposed settlement." 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice*, pt. 2, § 1.46, p. 75 (2d ed. 1985).

Bifurcated negotiations in fact may produce their own ethical problems. The attorney's fees provisions authorize an award of attorney's fees to the prevailing *party*. Although courts typically award these fees directly to the attorney, both the *Model Rules* and the *ABA Code* prohibit an attorney from acquiring an interest in the litigation. *See ABA Code*, DR 5-103(a); *Model Rules*, Rule 1.8(j). Consideration of the attorney's fees at the same time as all other aspects of the settlement prevents the appearance that the fees are a distinct part of the settlement in which only the attorney has an interest.

C. Current Law Provides Ready Solutions to Any Potential Ethical Conflict

Counsel who perceive ethical problems have numerous avenues for solutions. Many problems can be avoided by an open and frank exchange between the plaintiff's attorney and his or her client about potential conflicts. *Model Rules*, Rule 1.4. Retainer agreements also are useful in preventing misunderstandings. *See generally Moore*, 762 F.2d at 1105 n.17. If such routine practices are not sufficient in a particular case, counsel may seek help from the court, which is authorized by the Federal Rules of Civil Procedure to provide review and guidance. *See, e.g.*, Fed. R. Civ. P. 16 (pretrial conference for discussion of settlement); Rule 23(e) (settlement of class action only with approval of the court). If plaintiff's counsel does improperly compromise his or her client's interest, the Rules empower the court to review a settlement reached following simultaneous negotiations and to provide relief. In addition, the fee-shifting statutes themselves provide the court with significant power, to date largely unused, to review settlement agreements. Under the fee statutes, the court may "in its discretion" award a reasonable attorney's fee. The court thus possesses discretionary power to review the terms of any settlement reached after simultaneous negotiations, including, in an appropriate case, the authority to require specific evidence of consent by the plaintiff.

In any event, to the extent that the problems that arise from simultaneous negotiations are ethical problems, the appropriate solution is in the ethical, not the legal, arena. The bar, through the guidance of formal opinions and the enforcement device of disciplinary proceedings, is the proper vehicle for solution of ethical problems. This Court should not address what is essentially an ethics issue by endorsing a legal interpretation of the fee-shifting statutes that will discourage settlements and impede effective enforcement of the civil rights laws.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case to the Ninth Circuit for reconsideration in light of the principle that parties in civil rights cases may engage in simultaneous negotiations to settle both the merits and the attorney's fees.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK and WILLIAM GRUZINSKI,

Petitioners,

v.

JEFF D., PAULA E., JOHN M., and DUSTY R., Minors, By and Through Their Next Friend, CHARLES JOHNSON, III, Individually and on Behalf of the Class They Represent and MARK CLARY, Intervenor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE COMMITTEE ON LEGAL ASSISTANCE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* ON BEHALF OF RESPONDENT

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Table of Contents

	Page
Table of Authorities	iv
Interest of Amicus	1
Statement of the Case: The Questions Actually Presented	3
Summary of Argument	6
Argument	10
I. The Problem of Coerced Waiver of Statutory Attorneys' Fees is One Peculiar to Civil Rights Practice, Arising From the Nature of the Attorney/Client Relationship Typical of those Cases	10
A. The Nature of Civil Rights Cases	11
B. These Dynamics of Civil Rights Practice Result in Significantly Different Ethical Consequences	13
II. Given These Circumstances, A Defendant's Lawyer Who Makes an Offer of Settlement Conditioned on the Waiver of the Required Statutory Fee Violates Accepted Norms of Professional Ethics	22

A. The Use of the Waiver Tactic is Prejudicial to the Administration of Justice 24

B. The Use of the Waiver Tactic Undermines the Integrity of the Legal Profession 28

C. The Use of the Waiver Tactic is Inconsistent with the Lawyer's Duty to Act within the Bounds of the Law 31

D. The Use of the Waiver Tactic by Government Counsel is Particularly Inappropriate 40

III. A Bifurcated Approach to Negotiations of the Merits and Fees in Civil Rights Cases is the Most Appropriate and Effective Remedial Device for Preventing the Ethical Abuse of the Coercive Waiver and its Variants 43

A. Coercive Fee Waiver Agreements Should be Unenforceable 44

B. A Bifurcated Approach to Settlement Is the Most Effective Remedy 46

C. The Ordinary Judicial Tools Have So Far Proven Insufficient 54

D. The Criticisms of the Bifurcated Approach Are Inaccurate 58

CONCLUSION 64

Table of Authorities

Cases:	Pages
Adickes v. Kress & Co., 398 U.S. 144 (1970)	41
Blum v. Stenson, _____ U.S. _____, 79 L.Ed. 2d 891 (1984)	36, 58
Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977)	45
Hensley v. Eckerhart, 461 U.S. 424 (1983).....	61
Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985) 18, 19, 22, 30	
Lipscomb v. Wise, 643 F.2d 319 (5th Cir. 1981)	10
Moore v. National Assoc. of Securities Dealers, 765 F.2d 1093 (D.C. Cir. 1985) 17, 23, 30, 48, 54	
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)	33, 34
New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980)	33
Owen v. City of Independence, 445 U.S. 622 (1980)	41
Prandini v. National Tea Co., 557 F.2d 1015 (3rd Cir. 1977)	54, 55, 63
Regalado v. Johnson, 79 F.R.D. 447 (N.D. Ill. 1978)	10
United States v. ITT Continental Baking Co., 420 U.S. 223 (1975).	44

Weil v. Neary, 278 U.S. 160 (1929) .. 44

Woodstock Iron, Co. v. Richmond and Danville Extension Co., 129 U.S. 644 (1889) 44

Statutes:

Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 .. 5, 6, 10, 31, 37, 40, 42

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (Sept. 15, 1976) 11, 25, 33, 36 40, 42

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (June 29, 1976) 11, 25, 33, 34, 36

122 Cong. Rec. § 17052 (daily ed. Sept. 29, 1976) 12

Equal Access to Justice Act, 28 U.S.C. § 2412(d) 14

H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 5908 14

Federal Rules of Civil Procedure 23(e) 5

Materials on Legal Ethics:

ABA Code of Professional Responsibility 7

Preamble and Preliminary Statement 32

Canon 1 ..... 23, 28

Canon 2 ..... 23, 24, 25

Canon 5 19

Canon 7 ..... 23, 31

Canon 9 ..... 24, 29

Ethical Considerations

1-1 24

1-5..... 28, 32

2-1..... 24

2-24..... 12

2-25..... 12, 24

5-1 ..... 17, 19

5-18 41

7-4..... 32

7-7..... 18

7-9..... 17

7-10..... 42

7-12..... 19

7-14..... 42

7-18..... 25

7-23..... 60

8-3..... 24, 25

9-1..... 21, 29

9-6..... 7, 21, 29

Disciplinary Rules

1-102(A)(5) 25

2-106(B)(4) 12

2-108(B) 27, 59

2-109(A)(2) 32

5-101(A) 16

7-102 35

7-102(A)(1) & (2) 32, 62

ABA Model Rules of Professional Conduct (1983) 7

Preamble 25, 32, 42

Model Rules

1.2(a) 18

1.4(a) 18

1.5(a)(4) 12

1.7(b) 16

1.14 19

3.3(a)(3) 60

5.6(b) 27, 59

6.1 24

8.4(a) 29

8.4(d) 25

ABA Informal Opinion 1039 (1968) 27, 28

District of Columbia Bar, Legal Ethics Committee, Opinion No. 147, reprinted in 113 Daily Washington Law Reporter 389 (1985) 20, 23, 26, 39

State Bar of Georgia, Advisory Opinion No. 38, reprinted in 10 Georgia State Bar News 5 (1984) 22

Opinion No. 17 of Overseers of the Bar (Maine) (1981) 16, 20, 22

Formal Opinion C-235 (May 1985), reprinted in Michigan Bar Journal 508 (June 1985) 20, 22

Committee on Legal Ethics, The Association of the Bar of the City of New York .....

Opinion No. 80-94 ..... 2, 26, 39

Opinion No. 82-80 ..... 2, 37, 47, 58, 63

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Comment, Settlement Offers Conditioned upon Waiver of Attorney's Fees: Policy, Legal, and Ethical Considerations, 131 U.Pa. L.Rev. 793 (1983) 56

M. F. Derfner & A. D. Wolf, 2 COURT AWARDED ATTORNEYS FEES ¶ 21.03 n.36 (1984) 15

Fee Waiver Requests Unethical: Bar Opinion, 68 A.B.A.J. 23 (Jan. 1982) 17, 44

R. Fisher & W. Ury, GETTING TO YES (1981) 50, 52

Kraus, Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigation in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorneys' Fees Awards Act of 1976, 29, Vill. L.Rev. 597 (1984) 41, 46, 57

Levin, Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in which Statutory Attorney's Fees Are Authorized, 14 Clearinghouse Rev. 515, (Oct. 1980) 55

A. Miller, Attorney's Fees in Class Actions 224 (1980)..... 63

Restatement of Contracts 2d § 178 ... 44, 45

Restatement of Contracts 2d § 184 ... 45

INTEREST OF AMICUS[1]

The Association of the Bar of the City of New York was incorporated by act of the New York Legislature in 1871. It was formed, in part, "for the purposes of ... facilitating and improving the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession...." Constitution, Article II. It is composed of over 14,000 lawyers and judges practicing or residing in the City of New York. This brief is filed on behalf of the Association's Committee on Legal Assistance.

The interest of the Committee in this case is threefold. First, it seeks to encourage access to legal representation for all persons. It pursues this objective both by encouraging attorneys to undertake representation of indigents pro bono pub-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

Lico and by supporting the availability of statutory attorneys' fees in civil rights cases. In the opinion of the Committee, negotiation tactics such as those apparently used in this case threaten substantially to undermine the availability of statutory fees in civil rights cases and, therefore, the availability of counsel to indigent civil rights claimants.

Second, along with the Committee on Professional and Judicial Ethics, the Committee is interested in maintaining the high ethical standards of the profession. Its Opinion No. 80-94 (1981) concluded that offers of settlement in civil rights cases conditioned on a waiver of statutory attorneys' fees are professionally unethical. (A copy is attached as an appendix to this brief). As a corollary, the Association also opined that, in these cases, a defendant's lawyer should not initiate simultaneous negotiations of the merits of

the litigation and the issue of attorneys' fees. Subsequently, it issued Opinion No. 82-80, indicating that, during the course of negotiations for settlement on the merits, it is permissible to exchange reasonable information regarding a potential fee request so that the defendant can ascertain the extent of ultimate liability.

Third, along with the Committee on Federal Courts, the Committee is interested all developments that affect the administration of the federal courts. This case presents major issues of concern in that area.

STATEMENT OF THE CASE: THE QUESTIONS ACTUALLY PRESENTED

The many briefs filed by various amici on behalf of the petitioners treat the case as posing the question of the propriety of simultaneous negotiations of the merits together with the fees as a

single, universal question. While we endorse fully the reasoning of the court below in banning simultaneous negotiations in civil rights cases, that is not, in our view, the primary question presented nor a question necessary to decision in this case. Rather, this case is about the impropriety of a tactic that effectively coerces a waiver of the statutory fee.

This is well illustrated by the different ways in which the district court and the court of appeals conceived the case. In approving the fee waiver, the district court considered only the question of the ethical conduct of plaintiffs' counsel in negotiating fees in tandem with the merits.

> [T]he ethical consideration is "Is the attorney in the process of bargaining out to depreciate his client's claim or to proceed in a manner that will be unfair to his client?" And I think the ethical considerations run only to the issue and not to what is fair to the attorney, and therefore I am of the opinion that it doesn't violate any ethical considerations for an attorney to give up his

> attorney fees in the interest of getting a better bargain for his client.

Reporter's Transcript of Proceedings of April 28, 1983, ("R.T.") at 7.

The Ninth Circuit took a very different view. It noted that plaintiffs bargained for the district court's approval as "a condition on the waiver of fees...." Cert. App. 19a. Thus, it viewed the relevant question as one of the propriety under the statute, 42 U.S.C. § 1988, and F.R.C.P. 23(e) of the district court's approval of such a waiver when:

> The attorney was asked to choose between forgoing any compensation while obtaining a favorable settlement on behalf of the class, or declining the benefit for the class in hope of eventually receiving a fee award. Plaintiffs' attorney here accepted the benefit for the class and turned to the court for his own protection.

Cert. App. 23a. It concluded that a coerced waiver should not be accepted and that the plaintiffs are entitled to a reasonable fee. Id. at 25a.

SUMMARY OF ARGUMENT

The principal question in this case concerns the propriety of a negotiation tactic designed to coerce a waiver of statutory fees by pitting plaintiff counsel's duty to the client against his or her interest in a fee. It is a problem peculiar to civil rights practice, arising from the special circumstances that typically govern the attorney/client relationship in such cases. Accordingly, analysis premised on other models of representation -- such as contingent fees in tort cases or attorney/client relationships under other fee shifting statutes such as the antitrust laws or the Equal Access to Justice Act -- are not only unhelpful, but also misleading.

In this narrow context, the actions of defense counsel in conditioning settlement on waiver of fees tend to make a dead letter of §1988 and violate applicable

norms of professional ethics. First, it is prejudicial to the administration of justice because, contrary to both the congressional intent and the requirements of the canons, it serves to deter counsel from undertaking representation in these cases. Second, because the purpose and effect of the tactic is to place opposing counsel in a conflict of interest, it violates the lawyer's "solemn duty to uphold the integrity and honor of his profession...." Code of Professional Responsibility EC 9-6.[2]

The tactic is unethical because it is not the product of a good faith interpretation of the law in the client's favor, but rather the exploitation of a disequilibrium in litigating posture not related

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2 Citations to the Code of Professional Responsibility ("the Code"), which are the governing ethical standards for the New York bar, are directly to the relevant disciplinary rule ("DR"), ethical consideration ("EC"), or canon. Citations to the Model Rules are to ABA Model Rules of Professional Conduct(1983).

to the relative merits of the case. It is not a bona fide compromise because it ignores entirely the statutory obligation to pay fees that arises from the offer of relief on the merits that it accompanies. Thus, the use of this tactic by defense counsel runs afoul of the duty to confine zealous representation within the bounds of the law. It also violates the special duty of government counsel to seek a just and fair result.

A court should not enforce a fee waiver that is the result of this form of ethical abuse. Ordinarily, it should merely excise the fee waiver provision because the defendant is not entitled to the benefit of the bargain it has thus manipulated. But after-the-fact remedies are not sufficient in this context. Because the very existence of the unethical conduct may be masked by the appearance of voluntary waiver, a court may not always

be able to police such violations through retrospective remedies alone.

Two alternatives exist. The Court may direct active supervision by the federal district courts of settlement negotiations in these cases. Or, it may ban simultaneous negotiations of fees and the merits in these cases.

Of these two, we respectfully submit that the prohibition of simultaneous negotiations is the better, more efficient remedy. First, it preserves scant judicial resources; because it is self-enforcing, it requires less active involvement of the district court. Second, it will in fact facilitate settlements, both because it encourages more efficient negotiation -- encouraging the parties to negotiate on a principled basis and in good faith first on the merits and then, separately, on the plaintiffs' entitlement to fees -- and because it better maintains the balance of

incentives that ordinarily produces settlement. Third, it better controls other ethical problems that arise during simultaneous negotiations.

ARGUMENT

I. THE PROBLEM OF COERCED WAIVER OF STATUTORY ATTORNEYS' FEES IS ONE PECULIAR TO CIVIL RIGHTS PRACTICE, ARISING FROM THE NATURE OF THE ATTORNEY/CLIENT RELATIONSHIP TYPICAL OF THOSE CASES

In our view, this case does not turn on the question of the propriety of simultaneous negotiation on the merits and fees in the general run of cases nor on the question whether fees under 42 U.S.C. § 1988 ("the Act") are subject to settlement on reasonable terms. Rather, the question is whether defendants in a civil rights case may coerce a waiver of statutory fees by knowingly creating a conflict of interest for plaintiffs' counsel, pitting the clients' interest in relief on the merits against counsel's interest in a fee. The availability of this tactic is a

function of a narrow set of circumstances typical of civil rights cases but not normally present in most other areas of practice. We first explain how civil rights differs from most other areas of practice. We then show why the ethical issue is one that uniquely plagues the civil rights area.

A. The Nature of Civil Rights Cases

The basic fact, recognized by the Congress that passed the Act, is that civil rights claimants are typically indigent and cannot afford to pay legal fees.[3] Unlike ordinary tort or commercial litigation, civil rights cases rarely produce a fund sufficiently large also to cover the lawyer's fee.[4] Because of this, the

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3 S. Rep. No. 94-1011, 94th Cong , 2d Sess., 2 (June 29, 1976); accord H. R. Rep. No. 94-1558, 94th Cong., 2d Sess., 1, 3 (Sept. 15, 1976); Lipscomb v. Wise, 643 F.2d 319, 320 (5th Cir. 1981); Regalado v. Johnson, 79 F.R.D. 447, 451 (N.D. Ill. 1978).

4 H.R. Rep. No. 94-1558, supra n.3, at 9; S. Rep. No. 94-1011, supra n.3, at 6.

typical retainer agreement between a civil rights claimant and private counsel does not obligate the client to pay the fee, or even a substantial portion of it. It could not, either as a matter of practicality or ethics.[5] Thus, while retainer agreements often require the client to pay a portion of the costs or to advance a modest retainer, they usually recite that the lawyer's fee will be covered by a court award of attorney's fees. Congress was aware of this important difference in practice between civil rights cases and other forms of contingent fees. 122 Cong. Rec. § 17052 (daily ed. Sept. 29, 1976) (Remarks of Senator Kennedy as sponsor).

In addition, there is an entire (and large) class of civil rights counsel precluded by law from contracting for a fee

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5 See DR 2-106(B)(4) (prohibiting excessive fee; reasonableness of fee linked to "amount involved and result obtained"); accord Model Rule 1.5(a)(4); see also EC 2-24, EC2-25 (duty to represent indigents).

from the client. This includes the federal Legal Services Corporation, which provided counsel in this case and is barred by federal statute from charging a fee, and many private civil rights organizations. In New York, for example, private organizations that provide legal assistance are chartered by the courts as legal aid societies. Although they may accept court awarded fees, they are prohibited from collecting a fee from the client. In addition, since many of these organizations hold tax exempt status under § 501 (c)(3), they cannot and do not charge fees.

B. These Dynamics of Civil Rights Practice Result in Significantly Different Ethical Consequences

An offer of settlement on the merits conditioned on the waiver of statutory fees is a practice unique to civil rights cases because the circumstances that make it effective rarely exist in other fee

shifting contexts such as under the Equal Access to Justice Act[6] or the antitrust laws. For example, in an antitrust case brought by a corporation, the attorney

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6 The Solicitor General's arguments concerning the quandry imposed by the ruling below on the government when it litigates cases covered by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), ("EAJA") are completely inapposite. See Brief for the United States as Amicus Curiae at 13-14. For a variety of reasons, offers by the government to settle the merits of such litigation in exchange for a release of liability for fees under that Act rarely present similar ethical concerns.

Under the EAJA, the government is only liable for fees if "the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). Thus, unlike cases governed by § 1988, the private citizen litigating against the federal government is not entitled to fees under the EAJA simply because he or she prevails; it depends, instead, on the degree to which the government's position was unreasonable. The EAJA was passed not to encourage counsel to accept cases against the government, but merely to compensate citizens unreasonably forced to court by the government's unjustifed conduct. See H.R.Rep. No. 1418, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 5908-14. Often, these litigants are economic enterprises that can afford counsel. Accordingly, the retention of counsel in most cases within the coverage of the EAJA is exceedingly unlikely to be premised upon an agreement that all fees will be provided by a court award under the EAJA. Thus, the disassociation between the lawyer's and the client's interests in recovering a fee that makes the tactic coercive is entirely absent from the government's litigation in EAJA cases.

will have a retainer agreement that spells out the fee. If the defendant offers a flat percentage of the damage request in settlement, implicit in that offer will be a request to waive statutory fees. But no ethical dilemma is presented. The attorney explains to the client that the offer means the client will receive the settlement figure less the amount of the agreed fee.

Even when there is a traditional contingent fee, expressed as a percentage of the recovery, the interests of the lawyer and the client do not diverge. They are in fact parallel: the larger the client's recovery, the larger the fee. If the client and lawyer disagree on the adequacy of the amount offered, it is the client's decision whether the offer is sufficient in light of its bottom line value. See M.F. Derfner & A.D. Wolf, 2 COURT AWARDED ATTORNEYS FEES ¶ 21.03 n. 36 (1984).

Contrast a civil rights case for injunctive relief brought by a class of indigents. Defendants' counsel offer to settle the merits conditioned on a waiver of fees. If plaintiffs accept the offer, counsel, who may have invested significant time, will receive no fee whatsoever. The clients, who will benefit from the relief on the merits, are nevertheless unburdened by any liability for the lawyers' fees: either because they have no contractual fee obligation, as is usual, or in any case because they are judgment proof.

The offer thus creates a conflict of interest between lawyer and client, which would preclude the representation as an initial matter.[7] See DR 5-101(A); Model

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[7] This conflict of interest "cannot be resolved by the attorney resigning from the case. Plaintiffs in [these cases] must, of necessity, be represented by counsel and any attorney representing plaintiffs under these circumstances falls victim to the same statutorily created conflict." Opinion No. 17 of Overseers of the Bar (Maine) at 2 (1981) ("Maine Bar Op. No. 17").

Rule 1.7(b). When the terms of the settlement agreement are favorable, his duty "always to act in a manner consistent with the best interests of his client...," EC 7-9, comes in conflict with his legitimate interest in a fee.[8] The lawyer is required

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8 This conflict cannot be resolved by "prepar[ing] for the dilemma with a retainer agreement" as suggested by the Equal Employment Opportunity Advisory Council, Brief as Amicus Curiae at 6, and by Moore v. National Assoc. of Securities Dealers, 765 F.2d 1093, 1105 n. 17 (D.C.Cir. 1985). A retainer agreement which provides that the client will defer to counsel's pecuniary interest and refuse settlement would be unethical and unenforceable. EC 5-1. Nor could the retainer agreement require the client, though indigent, to bear the fee — that would be unethical too. See discussion supra. If the retainer provides that counsel would give up the fee, it just achieves the same result as the coercive waiver tactic.

The suggestion that the retainer agreement could vest the statutory fee recovery in the client presents the same problems and more. Such a retainer would have to provide that counsel would be paid a reasonable fee contingent on success. Presumedly, it would specify hourly rates. But this is a nonsolution.

First, it would not work for organizational counsel who cannot charge a fee. Second, it would not solve the coercive waiver problem. If the judgment proof client accepts the settlement, does counsel sue the indigent client for the fee he or she cannot pay? "Retainer agreements are useful devices for disclosing to clients the conflict of interest inherent in a case in which an attorney expects to be paid under a fee statute but, as a practical and legal matter, they are unsatisfactory devices for eliminating the con-

to communicate the settlement offer to the client,[9] who has the final say whether to accept it.[10] The predictable result is that the client will be induced to accept the settlement offer to the lawyers' detriment; whenever a waiver offer is made in these cases, "counsel can foresee themselves subject to being euchred out of their fee." Lazar v. Pierce, 757 F.2d 435, 438 (1st Cir. 1985).

The dilemma is intensified in a case like Jeff D. when the client class consists of incompetent minors.

> Any mental or physical condition of a client that renders him incapable of making a considered judgment on his

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flict of interest." Calhoun, Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988, 55 Colo.L.Rev. 341, 353-56 (1984).

9 Model Rule 1.4(a); Comment to Rule 1.4 ("A lawyer who receives from opposing counsel an offer of settlement in a civil controversy should promptly inform the client of its substance...."); see also EC 7-7.

10 EC 7-7 ("it is for the client to decide whether he will accept a settlement offer...."); Model Rule 1.2(a) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement....")

> own behalf casts additional responsibilities on his lawyer.

EC 7-12; see Model Rule 1.14; Comment to Rule 1.4. In that circumstance, the lawyer is "compelled ... to make decisions on behalf of the client...," and must "act with care to safeguard and advance the interests of the client." EC 7-12. Faced with a favorable offer of prompt relief, the lawyer must "exercise independent professional judgment on behalf of the client," Canon 5, "free of compromising influence and loyalties ...," EC 5-1; forgo his pecuniary self-interest; and accept the offer.

The suggestion from some quarters that it is "not an ethical no-no" for counsel "to insist on a reasonable fee" even if that is "detrimental to the client's successful settlement," Lazar, 757 F.2d at 438, has no support in either the standards of an ethical profession[11] or

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[11] Every bar association that has considered the issue

common sense. Consider the case of an unemployed client who was denied a job because of race. The defendant offers him a job and back pay, conditioned on counsel waiving the fee. Counsel could not in good conscience block the settlement and, at the least, postpone relief because their pecuniary interest is more important than that of the indigent client.

In this case, the safety of mentally ill children confined by the state was in jeopardy because they were housed with an adult population that included child molesters. The settlement offer contained

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has concluded that it would be unethical for counsel to turn down an offer of settlement in these circumstances. See Formal Opinion C-235 (May 1985), reprinted in Michigan Bar Journal 508, 553 (June 1985); Maine Bar Op. No. 17 at 4; Vermont Bar Association Opinion No. 85-3 at 2-3 (1985); District of Columbia Bar, Legal Ethics Committee, Opinion No. 147 at 5-6, reprinted in 113 Daily Washington Law Reporter 389, 394 (1985); Op. No. 80-94 at 6a-7a (1981). No bar association has ruled otherwise to our knowledge. The D.C. Bar Opinion does conclude that all future settlement offers that violate the opinion need not be conveyed to the client, although they should be.

detailed provisions designed to eliminate that problem. Cert. App. 3a-4a. Counsel might have rejected the settlement offer because of the fee waiver condition, forcing the case to trial. But suppose that, in the interim before relief was granted, even one child was assaulted, molested or raped. Would the lawyer have acted in a manner consistent with his ethical responsibility to that client? To proceed to trial under these circumstances because of the lawyer's interest in a fee would clearly fail to "promote public confidence in our system and in the legal profession." EC 9-1; see also EC 9-6.

In these situations, the ethical conflicts that face plaintiffs' counsel are extraordinary. Because of that, the temptation to employ the coercive fee waiver is strong. Indeed, various amici suggest that if fee waivers are approved they may be required to use them. See, e.g., Brief

for the States as Amici Curiae at 52-53. A fair, rational legal system deserving of the public's respect and confidence would not allow that to occur.

II. GIVEN THESE CIRCUMSTANCES, A DEFENDANT'S LAWYER WHO MAKES AN OFFER OF SETTLEMENT CONDITIONED ON THE WAIVER OF THE REQUIRED STATUTORY FEE VIOLATES ACCEPTED NORMS OF PROFESSIONAL ETHICS

This Association was the first to address squarely the issue of coercive waiver. It has since been joined by the D.C. Bar. Both have concluded that the tactic is unethical. See n.11 supra.[12] Even those courts that have approved waivers in particular cases have noted the questionable nature of defendants' conduct[13] or otherwise intimated that

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[12] In addition to the bar opinions cited in n.11 supra, the Georgia Bar has approved lump sum offers in Title VII cases. State Bar of Georgia, Advisory Opinion No. 38, reprinted in 10 Georgia State Bar News 5 (1984). Like the opinions of the Michigan, Maine, and Vermont bars, it does not discuss the waiver issue.

[13] In Lazar v. Pierce, the First Circuit observed of the waiver offer in that case: "We are ... critical of the Housing Authority. It seems apparent that it was playing on counsel's difficult dilemma in exactly the

important ethical considerations are raised by such conduct.[14]

This should not surprise. Whatever the considerations that govern other aspects of settlement negotiations in these cases, the use by defense counsel of the coercive waiver tactic violates accepted norms of professional responsibility. It runs afoul of the duty "to maintain ... the integrity of the legal profession...," Canon 1; the "duty to make legal counsel available ...," Canon 2; the duty to confine zealous representation of a client "within the bounds of the law ...," Canon 7; and the duty to "avoid even the appear-

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manner plaintiff asserts. This was not a bona fide compromise." 755 F.2d at 437. It continued: "While there may have been no consciously unethical conduct, to object to going to court, and to object to paying any fee, does not ... commend itself." Id. at n. 1.

[14] In Moore v. National Association of Securities Dealers, the court approved an express waiver "at least where a demand for such has not been made by a defendant." 762 F.2d at 1099. It further acknowledged "that such offers present some difficulty for plaintiffs' counsel." Id. at 1105 n. 17 (citing D.C. Bar. Op. No. 147).

ance of professional impropriety...." Canon 9.

A. The Use of the Waiver Tactic Is Prejudicial to the Administration of Justice

"A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent services of a lawyer...." EC 1-1. There is a special responsibility to provide or support legal assistance to the poor. EC 2-25; EC 8-3.

> The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally.... Every lawyer should support all proper efforts to meet this need for legal services.

Model Rule 6.1, Comment to Rule 6.1; accord Canon 2; EC 2-1.

These obligations arise not merely as a matter of noblesse oblige, but from the requirements of the legal system itself. "The fair administration of justice requires the availability of competent

lawyers....," EC 8-3, because "[t]he legal system in its broadest sense functions best when persons in need of legal ... assistance are represented by their own counsel." EC 7-18.[15] Thus, the lawyer's obligation under Canon 2 to assist in making legal counsel available merges with the injunction of DR 1-102(A)(5): "A lawyer shall not ... [e]ngage in conduct that is prejudicial to the administration of justice." Accord Model Rule 8.4(d). But this is precisely the effect of the waiver tactic.

The purpose of the Act was to provide legal representation to indigent civil rights claimants by the award of fees "adequate to attract competent counsel." S. Rep. No. 94-1011 at 6; H.R. Rep. No.

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[15] The Preamble to the Model Rules explains that: "A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."

94-1558 at 9. Congress knew that:

> Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [§ 1988] is designed to give such persons effective access to the judicial process....

Id. at 1. But "the long term effect of persistent demands for the waiver of statutory fees is to prejudice a vital aspect of the administration of justice and undermine efforts to make counsel available to those who cannot afford it...." Op. No. 80-94 at 13a; accord D.C. Bar Op. No. 147 at 7. The knowledge that counsel can be forced to forgo a fee by means of the waiver tactic spreads quickly; it deters lawyers from accepting representation of indigent civil rights claimants.[16]

The bar has long recognized that

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16 See Kraus, Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Awards Act of 1976, 29 Vill. L.Rev. 597, 674-95 (1984).

settlement agreements which serve to restrict access to legal representation violate the rules of ethics. In the late sixties, there was

> an ever-increasing practice accompanying the settlements in [antitrust] cases of taking from the plaintiff's counsel covenants not to sue or to aid in any suit against the settling defendants.

ABA Informal Opinion 1039 at 1 (1968). Although there were "not ... Canons clearly covering the matter," id. at 3, the Committee nevertheless condemned the practice because it "affects the right of the client to obtain the benefit of the services to which he is entitled from his own lawyer." Id. at 44. This ruling has been codified in both DR 2-108(B) and Model Rule 5.6(b).

The availability of a settlement provision such as that prohibited by DR 2-108(B) encouraged the defendants to settle. It is nevertheless unethical because it interferes with the ability of those in

need of legal assistance to retain counsel who are competent in the subject matter. Informal Opinion 1039 at 4-5. The waiver tactic is more harmful. Not only does it affect the lawyer in the particular case, it also deters all other lawyers from accepting civil rights cases because they can be forced to give up their fee. Use of the tactic prejudices the administration of justice because it threatens to undermine the very device Congress found necessary to provide legal representation in civil rights cases.

B. The Use of the Waiver Tactic Undermines the Integrity of the Legal Profession

Canon 1 provides that: "A lawyer should assist in maintaining the integrity ... of the legal profession." This duty not only requires the lawyer to "maintain high personal standards of professional conduct" himself, but also to "encourage fellow lawyers to do likewise." EC 1-5.

This duty stems, in part, from the principles of Canon 9, that "[a] lawyer should promote public confidence in our system and in the legal profession." EC 9-1; see also EC 9-6 ("Every lawyer owes a solemn duty to uphold the integrity and honor of his profession...."). The Model Rules express the same concept in plain and unmistakable terms. "It is professional misconduct for a lawyer to ... knowingly assist or induce another to [violate or attempt to violate the rules of professional conduct] ...." Model Rule 8.4(a) (emphasis added).

Defendants' counsel who make settlement offers designed to create a conflict of interest between opposing counsel and the client plaintiff act in a manner inconsistent with their duty to the profession. At the worst, they induce plaintiffs' counsel to abandon their clients' interest in favor of their personal, pecu-

niary interest. But, the integrity of the profession may be undermined even when ethical plaintiffs' counsel resist the conflict. Ensnared in the conflict created by the waiver tactic, well meaning counsel have often acceded to the coercive demand of waiver expecting subsequently to challenge it before the district court. Although one state bar has approved such a challenge as ethical, Vermont Bar Association Opinion No. 85-3, some courts have condemned the "secret plan to rescind" as "exactly the wrong way" to "in effect, build upon a misrepresentation." Lazar, 757 F.2d at 438-39; see also Moore v. National Association of Securities Dealers, 762 F.2d 1093, 1110 (D.C. Cir. 1985). In addition, courts have been "even more critical of" defense counsel for "playing on counsel's difficult dilemma." Lazar, 757 F.2d at 437.

C. The Use of the Waiver Tactic Is Inconsistent with the Lawyer's Duty to Act within the Bounds of the Law

Defendants and their amici vigorously disclaim any unethical conduct and instead argue that the use of coercive waiver offers is justified by their ethical duty under Canon 7 to provide their clients with zealous representation. They err, however, because Canon 7 requires that zealous representation must be contained "within the bounds of the law." Analysis of the dynamics of the coercive waiver tactic and the bounds of the law under § 1988 demonstrates that the waiver tactic is unacceptable and unethical.

We start from the same initial premise as the Code.

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law.... Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Preamble and Preliminary Statement at 1.[17] "To lawyers especially, respect for law should be more than a platitude." EC 1-5. This means, of course, that positions espoused on behalf of clients are not ethical solely because they are "favorable to the client." EC 7-4. Rather, they must also be "supported by the law or ... supportable by a good faith argument for an extension, modification, or reversal of the law." Id. Accord DR 7-102(A)(1)&(2); see also DR 2-109(A)(2).

Thus, to analyze the ethics of an offer of settlement conditioned on a waiver of fees, it is necessary to explore the basis of the defendant's negotiating

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[17] As expressed in the Preamble to the Model Rules: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the qualilty of justice....

"The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."

position. One could not ethically argue to a court that fees should be denied to a prevailing plaintiff because the defendant disapproves of that expense or believes that the policy of the Fees Act is wrong. Under the Act, a prevailing plaintiff is entitled to a "reasonable attorney's fee," which he or she "should ordinarily recover ... unless special circumstances would render such an award unjust." S. Rep. No. 94-1011 at 4; H.R. Rep. No. 94-1558 at 6 (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)).[18]

Congress provided for fees for three reasons. The first was retrospective: to compensate the individual litigant, see S. Rep. No. 94-1011 at 2, imposing on civil rights defendants the obligation to pay

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[18] The intimation that awards of counsel fees are wholly discretionary, see Petitioners' Brief at 13, is inaccurate. See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 68 (1980) ("the court's discretion to deny a fee award to a prevailing plaintiff is narrow.")

the transaction costs of their violations. But it also had two prospective purposes: "to encourage individuals injured by racial discrimination to seek judicial relief ...," Newman, 390 U.S. at 402, and to provide a disincentive to future violators.[19]

Defendants are not ethically free to seek to evade these obligations, although that would serve their pecuniary interest. Defendants' counsel may take any good faith position regarding what is a "reasonable attorney's fee" in a given case. But, absent special circumstances, counsel cannot argue that a prevailing plaintiff should be deprived of a reasonable fee and still be "within the bounds of the law."

Nor may lawyers seek in settlement

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19 Congress determined that "the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." S. Rep. No. 94-1011 at 5 (emphasis added).

that which is contrary to law. DR 7-102. When defendants' counsel seek to coerce a waiver of fees, they are attempting to effectuate precisely the opposite of what Congress intended: to make the indigent civil rights claimant bear his or her own costs in the particular case and to make civil rights litigation unattractive generally.

True, settlement normally encompasses a compromise of the full measure of relief on the basis of the likelihood of success. But that does not salvage a settlement offer of less than a reasonable fee, let alone an offer of no fee at all. Under § 1988, a settlement offer of substantial relief on the merits and no fee is, in terms, an offer not premised on the likelihood of success. For Congress explicitly considered when a settling plaintiff is entitled to fees and adopted a purely functional approach: Plaintiffs

are entitled to fees if "they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011 at 5; accord H.R. Rep. No. 94-1558 at 7. Indeed, even when "a defendant might voluntarily cease the unlawful practice ..., [a] court should still award fees" if the filing of the lawsuit was the catalyst for such "voluntary" compliance. H.R. Rep. No. 94-1558 at 7; accord S. Rep. No. 94-1011 at 5. Thus, under the Act, the obligation to pay fees arises not from success at trial --which is estimated in settlement-- but from the accomplishment by plaintiff of the desired end.[20] Under the Act, a defendant that offers favorable relief on the merits

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20 This is, in part, a function of Congress's intention that fees be governed by "prevailing market rates," Blum v. Stenson, ___ U.S. ___ 79 L.Ed.2d 891, 900 (1984); the market would not deny counsel a fee because success was achieved by agreement rather than litigation.

obligates itself to pay a reasonable fee.[21] A negotiation tactic that evades that obligation is not within the bounds of the law.

Contrast a case in which § 1988 would not obligate the defendant to pay counsel fees. A defendant, for example, may have identified and moved to rectify a civil rights violation before the plaintiffs' suit is begun. Because the relief measures antedate the suit -- and, therefore, plaintiffs were not the catalyst for relief -- a defendant could assert in good faith that it is not required to pay fees under the Act. In this "noncatalytic" case, a defendant could combine relief on the merits with a waiver offer and still be "within the bounds of the law"[22] --

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21 As long as it does not condition fees on merits relief, it can bargain over what is a reasonable fee. To do so, it is entitled to disclosure of the plaintiffs' fee request. N.Y.C. Op. No. 82-80.

22 There is no suggestion whatsoever that this case involved such circumstances. Rather, the acceptance by the defendants of detailed injuctive relief only on

although, as we show in Pt. III, it would also be unnecessary as a practical matter.

A comparative analysis of the dynamics of the waiver offer in these very different circumstances is instructive. In a "noncatalytic" suit, the waiver offer is premised on a good faith interpretation of the law and the facts in the client's favor. It is effective because of the strength of defendant's legal position alone. And, one might add, it achieves a fair and expeditious resolution of the dispute, providing plaintiffs with no less than they are entitled to.

In the ordinary case, however, the waiver demand is not premised on a good faith reading of the law. It is effective regardless of the merits of the case or the likelihood of success. And while it provides plaintiffs with a compromise mea-

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the eve of trial rebuts any possibility that the state had planned the changes prior to the lawsuit, begun two years earlier.

sure of relief with respect to one aspect of the case (the merits), it provides no relief whatsover with regard to the second aspect of the case (the statutory entitlement to attorneys' fees).

In the ordinary case, the waiver tactic is effective not because plaintiffs calculate the likelihood of success and determine to accept relief without fees; it is effective solely because the defendants can exploit the ethical quandary that it creates. It is "a demand ... that the plaintiff's lawyer cannot resist as a matter of ethics and in which the plaintiff has no interest and therefore will not resist." D.C. Bar Op. No. 147 at 5-6; N.Y.C. Bar Op. No. 80-94 at 7a. It results not in a fair and expeditious settlement, but rather in an undeserved windfall to the civil rights violator who avoids the statutory obligation to pay fees.

D. The Use of the Waiver Tactic by Government Counsel is Particularly Inappropriate

In the hands of government, the waiver tactic will be particularly effective in defeating the goal of providing legal representation contemplated by Canon 2 and the Act. And given their special responsibilities in our system, it is particularly inappropriate for the government and its counsel to coerce a settlement that evades the law and is unjust.

Because "governmental officials are frequently the defendants in cases brought under the statutes covered by" § 1988, H.R. Rep. No. 94-1558 at 7, they are best situated to discourage plaintiffs' counsel by repeated invocations of the coercive waiver tactic.

> Permitting conditional fee settlements favors public entities and other habitual abusers who are customarily defendants in civil rights cases. They can better fend off subsequent claims and continue unlawful practices by the use of intentional and concerted insistence on fee waivers. The reputation of specific de-

> fendants who utilize fee waiver tactics quickly spreads, and the civil rights bar is forced to switch resources to other "targets." Thus, the most flagrant offenders are rewarded.

Kraus, supra n.16, 29 Vill. L.Rev. at 644-45 (footnotes omitted). Yet, as the Court has noted in a related context:

> How "uniquely amiss" it would be therefore, if the government itself -- "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct" -- were permitted to disavow liability for the injury it has begotten.

Owen v. City of Independence, 445 U.S. 622, 651 (1980) (quoting Adickes v. Kress & Co., 398 U.S. 144, 190 (1970) (Brennan, J., concurring)).

Government counsel's duty of loyalty runs not to particular officials but to the entity.[23] Therefore, they cannot ignore the impact of their actions on plaintiffs,

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23 See EC 5-18: "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity...."

who are the entity's citizens.[24] And because they represent the government, they have a heightened duty to see that the law is complied with. Thus, the Code cautions that:

> A government lawyer in a civil action ... has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC 7-14.[25] The coercive waiver tactic runs afoul of this ethical command because it

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24 This irony was not lost upon the Congress that passed § 1988. It noted that: "Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including taxes paid by the plaintiffs themselves." H.R. Rep. No. 94-1558 at 7.

25 The nongovernmental lawyer also has a duty of fair dealing. EC 7-10 provides that: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved with the legal process and to avoid the infliction of needless harm." Similarly, the Preamble to the Model Rules observes that: "As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others." The point is only that the responsibility of government counsel is greater.

exploits the government's better economic position to deprive opposing counsel of their statutory fee.

III. A BIFURCATED APPROACH TO NEGOTIATIONS OF THE MERITS AND FEES IN CIVIL RIGHTS CASES IS THE MOST APPROPRIATE AND EFFECTIVE REMEDIAL DEVICE FOR PREVENTING THE ETHICAL ABUSE OF THE COERCIVE WAIVER AND ITS VARIANTS

The ethical abuse occasioned by the coercive waiver tactic is not a rare or isolated occurrence. It has been estimated "that there are requests for fee waivers in more than half of the civil rights cases litigated." Fee Waiver Requests Unethical: Bar Opinion, 68 A.B.A.J. 23 (Jan. 1982). As noted above, the petitioners and their amici suggest they may be compelled to use the tactic by their ethical responsibility to their clients. A practice thus entrenched requires more than rhetorical censure; the courts must develop and enforce appropriate measures to prevent such ethical abuses.

A. Coercive Fee Waiver Agreements Should Be Unenforceable

A "contract...in violation of public policy and professional ethics...calls for judicial condemnation." Weil v. Neary, 278 U.S. 160, 174 (1929). Faced with a fee waiver that is the result of this form of ethical abuse, a court should apply the traditional rule that contracts against public policy are unenforceable.[26] See, e.g., Woodstock Iron, Co. v. Richmond and Danville Extension Co., 129 U.S. 644 (1889); Restatement of Contracts 2d § 178. This is particularly so when "the strength of that policy [i]s manifested by legislation." Id., subsection (3)(a).

The unenforceability of the coercive fee waiver, however, should not in a case like this result in the invalidity of the balance of the settlement agreement. In

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26 "[A] consent decree or order is to be construed for enforcement purposes basically as a contract...." United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975).

refusing to enforce contractual terms that are void as against public policy, courts generally preserve the balance of the contract, and even of the term. Restatement of Contracts 2d §§ 178, 184. This is particularly true when, as here, the party seeking enforcement of the balance acted "in good faith and in accordance with reasonable standards of fair dealing." Id., § 184(2). When the substance of the settlement on the merits is, on its own, a reasonable compromise, cf. Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977), it should be enforced because the fee waiver cannot be said to have been "an essential part of the agreed exchange." Restatement § 184(1). That the defendant does not receive the full benefit of its bargain is of little consequence when that bargain was obtained unethically: "This [i]s not a bona fide compromise." Lazar, 757 F.2d at 437.

But unless the Court is clear on both the unenforceability and the severability of fee waivers, this form of judicial review will be ineffective. The defendants, as here, often counter such efforts with a request to undo the negotiated settlement on the ground that the fee waiver was the consideration for the grant of relief on the merits. This can be as effective in preventing plaintiffs' counsel from challenging the waiver as that tactic was coercive in the first place: "each step forward reintroduces precisely the same ethical dilemma that originally forced the acceptance of the fee waiver." Kraus, 29 Vill.L.Rev. at 620-22; see Vermont Bar Op. No. 85-3 (attorney may challenge coerced fee waiver as long as it does not jeopardize client's recovery).

B. A Bifurcated Approach to Settlement Is the Most Effective Remedy

We respectfully submit that, for four reasons, a flat ban on simultaneous or

conditional negotiations of the merits and fees in this narrow class of cases is the best remedy.[27]

1. A flat ban on simultaneous negotiation deals directly with the waiver problem by removing the context that makes the tactic effective. It gives clear guidance to busy district courts, eliminating the uncertainties of a case-by-case approach.

2. A bifurcated approach to settlement better preserves scant judicial resources. Reliance on district court supervision would only be successful in direct proportion to the amount of time and effort expended by the district court. Actual supervision of negotiations could be very time consuming. After-the-fact review might require reconstruction of

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[27] This would neither preclude defendants from obtaining reasonable information regarding prospective fee requests, N.Y.C. Bar Op. No. 82-80, nor from negotiating separate fee settlements after agreement has been reached on the merits.

the course of negotiations in an effort to ascertain whether the defendants' negotiation tactics were in fact coercive. See Moore, 762 F.2d at 1114-15 (Wright, C.J., dissenting).[28] The bifurcated negotiation approach, on the other hand, is self-enforcing. It is successful because, by removing the context that makes the coercive waiver tactic and its variants effective, it ends their use. If the ban on simultaneous or conditional negotiation is breached, a simple application to the court can bring prompt sanctions.

The argument that bifurcation would require two settlement hearings is mispla-

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28 Judge Wright's dissenting opinion catalogues the progress of the settlement negotiations in Moore and shows that the "waiver" offer came from the plaintiffs because, by a pattern of responses and nonresponses to prior settlement offers, "NASD's counsel had made absolutely clear that the merits proposal was perfectly acceptable, but that NASD would not agree to that merits proposal unless the question of fees and costs were resolved[a]nd ... that only a waiver ... would satisfy NASD and permit the merits settlement to go forward." Id. at 1115 (emphasis in original).

ced. Counsel may separately negotiate the merits and fees, without conditioning one on the other, and present both agreements to the court at one hearing. Moreover, the conflicts of interest and the resulting opportunities for abuse that occur in civil rights cases are not limited to class actions. Thus, even if the bifurcated negotiation approach might occasionally yield more settlement hearings in class action cases, the alternatives -- intensive after-the-fact scrutiny or supervision of negotiation -- would require greater district court resources in every case.

The bifurcated approach encourages the parties to bargain in good faith on a principled basis to reach a reasonable compromise on the merits of each aspect of the case: first, on the question of relief and, separately, on an appropriate and reasonable fee. That form of "principled

negotiation produces wise agreements amicably and efficiently." R. Fisher and W. Ury, GETTING TO YES 86 (1981). In the long term, it will conserve judicial resources.

3. The bifurcated approach will in fact encourage settlements, despite the superficially appealing assertions to the contrary. The current availability of "sacrifice" tactics disserves the settlement process. In many of these cases, the ultimate liability for the plaintiffs' attorneys' fees may be the single largest incentive for compliance. This is obviously true, for example, when the monetary or injunctive relief at stake is minor. But it will also be true in cases in which the injunctive relief is very costly. In those cases, the lower transaction costs of in-house litigation are offset by the larger savings that accrue from delaying implementation. Thus, the availability of

"sacrifice" tactics as a method of avoiding or reducing liability for fees removes the largest economic incentive to voluntary compliance without litigation. See Kraus, 29 Vill. L.Rev. at 643-44.

Once litigation has begun, the ability to avoid or reduce fee liability by later use of "sacrifice" tactics is an incentive to delay settlement to the last moment, as occurred in this case. In contrast, the bifurcated negotiation process makes clear that defendants will not be able to avoid the payment of accrued fees. Thus, there is a strong incentive either to comply voluntarily or to settle at an early stage before the accrued fees become very large.

The availability of "sacrifice" tactics disserves the settlement process in another way. Plaintiffs' counsel know that they face the possibility of being manipulated to compromise their fee if they

engage in simultaneous negotiations. Therefore, many counsel will simply refuse to negotiate if the defendants insist on simultaneous negotiations.

When negotiations have already begun, the interjection of "sacrifice" tactics is likely to derail the process. As the petitioners point out, the community of interests shared by the parties is often the most effective basis of settlement. Brief for Petitioners at 27-28. The invocation of the coercive waiver tactic or its variants destroys the plaintiffs' faith in the other side's bona fides. It thus not only destroys the community of interests that might lead to settlement, but also decreases the value of any settlement that might be achieved. "A wise plaintiff knows that ultimate success 'depends to a degree on making the other side sufficiently content with an agreement to want to live up to it.'" Brief for Petitioners at 28 (quo-

ting Fisher & Ury, supra, at 75). But by the same token, a wise plaintiff knows that the agreement he or she gets is only as valuable as the good faith of the other side in implementation; the invocation of the waiver tactic destroys any hope the plaintiff might have that a settlement is worth achieving.

4. The bifurcated approach better controls other forms of ethical abuse. It is more effective in dealing with the partial sacrifice and partial sweetheart situations --which develop from the trade-off of merits relief for fees relief or vice versa-- that will be hard to uncover in an after-the-fact review of the result. Moreover, even when simultaneous negotiations result in a perfectly fair and ethical settlement, it creates an appearance of impropriety. What the public sees is a bunch of lawyers setting their own fees amongst themselves at the possible expense

of the client, not the context of the overall result.

C. The Ordinary Judicial Tools Have So Far Proven Insufficient

Judicial scrutiny of settlement agreements may be effective in the "sweetheart" context -- when overly generous attorneys' fees are exchanged for a compromise of the interests of the client class, see Prandini v. National Tea Co., 557 F.2d 1015, 1020-21 (3rd Cir. 1977) -- because the ethical abuse is more readily apparent from the terms of the settlement. But "sacrifice" agreements -- like coercive waiver and its variants -- resist effective scrutiny. When defendants require plaintiffs' counsel to accept a lower fee in exchange for relief on the merits, the result may be indistinguishable in hindsight from a tough but good faith bargain. Similarly, coercive fee waivers come wrapped in the rhetoric of knowing and voluntary waiver, see, e.g.,

Moore, 762 F.2d at 1107, and are often mistaken for a voluntary barter of the fee for relief on the merits (the "bargaining chip" theory). Id. at 1105. That is how the district court erred in this case, R.T. 7, even though plaintiffs' attorneys negotiated a provision requiring court approval that should have alerted the court to the fact that the waiver was not voluntary.

Simply to remit this issue to the lower federal courts would be to require busy judges to assess complex negotiations without necessary guidance. Thus, when counsel have sought district court intervention during negotiations the results have often been unsatisfactory.[29] Indeed, a

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29 In one case, the parties negotiated a settlement without discussing fees. Prior to its presentation to the court for approval, however, the defendants insisted that the settlement was conditional on a full waiver of fees. Relying on Prandini, plaintiffs' counsel raised the matter with the district court. The court declined to rule; plaintiffs' counsel were forced to acquiesce to the waiver in light of the client's interest in relief on the merits. Levin, Practical, Ethical and Legal Consi-

majority of the rulings in these cases are unreported, reflecting that these problems are not always considered with depth.[30] The problem is compounded because the absence of reported decisions, together with the disincentives to appeal,

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derations Involved in the Settlement of Cases in which Statutory Attorney's Fees Are Authorized, 14 Clearinghouse Rev. 515, 519 (Oct. 1980).

In another case, counsel's motion to the court to prohibit the defendants from insisting on a fee waiver instead prompted the court to direct the plaintiffs counsel to continue to negotiate and to act in the client's best interest. The agreement that resulted included a fee waiver. Counsel's effort to set aside the waiver provision was met with a motion by the defendants to set aside the entire agreement; the court approved the agreement and the fee waiver. When the plaintiffs appealed, defendants cross-appealed, again placing the relief on the merits at risk. Because of this, the appeals were voluntarily dismissed. Comment, Settlement Offers Conditioned upon Waiver of Attorney's Fees: Policy, Legal, and Ethical Considerations, 131 U.Pa.L.Rev. 793, 802 (1983).

30 For example, some courts have tended wrongly to assume (See Pt. I supra) that fees in this context are no different than any other. No doubt courts have also been affected by the important role that settlements play in judicial administration. Understandably, courts not fully familiar with the dynamics of the settlement process may be reluctant to tinker with any aspect of the "mix" that now produces settlements.

have effectively shielded the practice from adequate scrutiny; "the most blatant examples of conditional Fees Act waivers almost never reach appellate courts." Kraus, 29 Vill. L. Rev. at 620.

Thus, federal district court intervention is unlikely to serve as an effective remedy to this practice. The lower courts would require an affirmative directive sensitively to police such abuses.[31] Because of the limitations of retrospective review, active supervision of the conduct of negotiations that concern both the merits and fees would be required.

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[31] The petitioners' assertion that district courts already have adequate tools to police such misconduct, Brief for Petitioners at 34-35, misses the mark because it fails to acknowledge the conditions noted above that render these tools ineffective in fact. Indeed, the petitioners would make district court intervention even less likely and less effective by erecting additional barriers: They would create a new presumption of ethical conduct by defense counsel that the already victimized plaintiffs' counsel would have to overcome. Id. at 35-36.

D. The Criticisms of the Bifurcated Approach Are Inaccurate

Contrary to the assertions of petitioners and their amici, the bifurcated approach does not impinge on the ethical responsibilities of defense counsel. Defendants have a legitimate interest in knowing the extent of their liability. But that does not mean that overzealous counsel may coerce a waiver or partial waiver of fees. Other avenues are open to ethical defense counsel to further their clients' interest in limiting liability. For example, defendants can request reasonable information concerning hours and rates. See N.Y.C. Bar Op. No. 82-80. Then, applying the standards enunciated in Blum v. Stenson, 79 L.Ed.2d at 901-03, they can figure their outside liability with reasonable accuracy. Or they can limit their liability for fees by settling meritorious suits promptly. They can aggressively bargain over a reasonable fee, seeking to

exclude compensation for unnecessary effort. Or they can argue that the suit was in fact meritless and, although nominally settled, should not result in a substantial fee. All of these options preserve vigorous advocacy for both sides, unlike the coercive waiver tactic which preempts the process.

That defense counsel cannot achieve the most advantageous result for their clients neither means that "sacrifice" tactics are ethical, nor that a ban on simultaneous negotiations conflicts with ethical obligations. Many other ethical rules restrict zealous representation. Obtaining from opposing counsel a covenant not to sue the defendant in another action as a condition of settlement both serves the defendant's best interest and induces the defendant to settle. It is nevertheless unethical. DR 2-108(B); Model Rule

5.6(b).[32]

The defendant's inability to fix with certainty the amount of total liability all at once will only prevent settlement in the rarest case. The same considerations that now prompt parties to settle will continue to favor settlement over litigation in most cases. In suits for monetary relief, the defendant will still settle because settlement costs less than the full contingent liability. In injunctive cases, the defendant will settle because a negotiated settlement gives it the maximum control over the terms of the eventual decree. In either case, settlement saves the defendant both its further costs of litigation and the larger liability for attorneys' fees that would other-

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[32] Another example is the rule requiring counsel to disclose adverse authority directly on point. EC 7-23; Model Rule 3.3(a)(3). It directly disserves the client's interest but is required by the lawyer's obligations both to the tribunal before which he or she is practicing and to the law.

wise accrue.

Bifurcated negotiations might deter settlement in cases in which the defendant could avoid all liability for fees if the case proceeded to trial. In that case, the prospect of conferring prevailing party status on the plaintiff by settling without a concurrent waiver of fees would seem to deter settlement. One such circumstance is the "noncatalytic" suit described above. But in that case, the defendant can simply settle and oppose the fee award by demonstrating that compliance predated filing.

The truly meritless suit is another such circumstance. But in that case, the defendant has numerous alternatives. It can settle early when the fee award will be small. Even when the lack of merit does not appear until late, it can seek to limit the fee recovery on the grounds of the meager results obtained. See Hensley

v. Eckerhart, 461 U.S. 424 (1983). And, when the case is frivolous, it can sue for its own attorneys' fees.

True, there may be some meritless cases in which the defendant, unwilling to run the risk of fee liability, will not settle. But that may well be a benefit. It is often assumed that some plaintiffs' lawyers file meritless suits for their "nuisance value," hoping that defendants will settle just to avoid the cost of litigation.[33] To the extent that bifurcated negotiations make meritless suits less likely to settle, they reduce the incentive to file such "nuisance suits." That furthers both the sound administration of justice and the long term interests of defendants.

The advantages of the bifurcated approach to settlement pioneered by the

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[33] Such suits are plainly unethical because not premised on a good faith interpretation of the law. See DR 7-102(A)(1) & (2).

Third Circuit in Prandini are substantial. It is not surprising, therefore, that the Prandini approach has broad support. In his report to the Federal Judicial Center on fees in class action cases, Professor Miller reported the results of a questionnaire on the subject: 51.9% of the judges responded that they agreed with the Prandini approach; 65.6% of the attorneys agreed. A breakdown for the attorneys' response shows bipartisan support for the rule: 65% of plaintiffs attorneys and 59.4% of defendants attorneys support the rule. A. Miller, Attorney's Fees in Class Actions 224 (1980).[34] The Association's opinions, supporting the Prandini approach in the civil rights area where the considerations are stronger, were the result of extensive deliberation by members of

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34 Professor Miller also reported that the problems with the Prandini approach are mitigated by providing the defendant with information regarding the fee request, id. at 223, a practice that the Association has approved of. Op. No. 82-80.

the bar with a variety of perspectives. A rule with such a high degree of support from those in practice cannot be as unworkable as petitioners and their amici contend.

In sum, the bifurcated approach is the most effective remedy for a practice that impugns the integrity of the legal system and subverts the intent of Congress. It both removes the opportunity for impropriety and prevents the appearance of impropriety in the settlement process in civil rights cases. It is workable; it will encourage fair and expeditious settlements more than it will deter them. It should be affirmed by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Opinion Number 80-94

Inquiry Reference No. 80-94:

Opinion on Settlement Offers in Public Interest Litigation Conditional on Waiver of Statutory Fees

Many statutes providing protection for civil rights and civil liberties also provide for an award by the court of attorneys' fees to successful plaintiffs.[1] The purpose of these attorneys' fee provisions is to encourage enforcement of the rights protected by the statute by persons

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1 See, e.g., 20 U.S.C. § 1617 (Education Amendments of 1972) (action charging state or local education agency with discrimination); 42 U.S.C. § 19731(e) (Voting Rights Act); 42 U.S.C. § 2000a-3 (Civil Rights Act of 1967) (discrimination in public accommodations); 42 U.S.C. § 20003-5 (Civil Rights Act of 1964) (discrimination in employment); 42 U.S.C. § 3612(c) (Fair Housing Act of 1968) (discrimination in the sale or rental of housing); 42 U.S.C. § 1988 (Civil Rights Attorneys' Fees Award Act of 1976). Recently, Congress enacted the Equal Access to Justice Act, which amends 5 U.S.C. § 504 and 28 U.S.C. § 2412 to permit counsel fee awards against the United States in certain agency and judicial proceedings.

who would otherwise be unwilling or unable to bear the cost of doing so. These statutes also have been interpreted to permit an award of attorneys' fees upon a settlement.[2]

We have received a number of informal inquiries by lawyers for public interest organizations, who frequently represent plaintiffs in actions under these statutes, asking whether it is ethical for defense lawyers in such actions (typically, but not always, government counsel) to make settlement offers in such suits conditional on a waiver of statutory fees. The inquiring lawyers have pointed out that such demands place public interest lawyers in an impossible conflict between their interest in fees to help finance

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2 In Maher v. Gagne, 100 S. Ct. 2570 (1980), the Court held that counsel fees under 42 U.S.C. § 1988 may be awarded even after settlement of a plaintiff's claim or following a consent judgment. In either case, the plaintiff may be a "prevailing party" within the meaning of the statute.

their program and the interests of their clients in the merits of the settlement, which ultimately forces plaintiffs' counsel to submit to such demands for the waiver of the fee.

At a public forum on ethical problems in public interest litigation co-sponsored by this Committee last Fall, panelists and members of the audience repeatedly noted their concern with this practice, urging that it was not only an unfair bargaining tactic, but that it would ultimately have a deleterious effect on civil rights statutes, the enforcement of which depend in important part on the availability of statutory counsel fees.

In this opinion we explain why we believe that such conditional settlement offers are unethical in actions arising under civil rights and civil liberties statutes.

I

As a rule, this Committee does not respond to inquiries by lawyers about the conduct of other counsel. Our function is to provide guidance to inquiring lawyers about their own proposed conduct. We do not pass judgment on complaints about others; that is the province of the Departmental Disciplinary Committee and the courts which can afford due process hearings. Nevertheless, in this instance the Committee has decided to give its opinion, not as a condemnation of past practice, but as a guide to future conduct.

The question concerning the ethics of conditional settlement offers is one which bears not only on the conduct of defense counsel who make such offers, but on the conduct of plaintiffs' counsel who must decide how to respond to such offers. We decided that we could not responsibly counsel plaintiffs' lawyers on their obli-

gation when confronted with such conditional settlement offers without considering the ethics of the conditional settlement offer itself. We issue this opinion, however, recognizing that there is no clear precedent by which defense counsel could have guided themselves in the past.

II

As already indicated, the demand for a waiver of statutory counsel fees as a condition to settlement presents a severe dilemma for plaintiffs' counsel.

Frequently, plaintiffs' counsel in civil rights litigation are employed by a public interest organization which does not accept fees from the client as a matter of policy and in any event, plaintiffs in such cases often have no resources to pay a fee. In such cases, waiver of the attorneys fees will affect only the lawyers and their organizations, who depend entirely on the statute for

their fee; the client who is not obligated or is unable to pay fees, has no stake in the statutory fee and is hence not concerned with its waiver.[3] Yet plaintiff's counsel owes undivided loyalty to the client and is obliged to exercise his

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3 As the Fifth Circuit noted recently in Lipscomb v. Wise, ____ F.2d ____ (April 22, 1981), a case recognizing an attorney's right to appeal from a denial of a fee in a civil rights case:

> "In theory, attorneys for a litigant are not personally affected by a judgment. Even in the limited class of cases in which attorney's fees may be awarded, the award is made to the prevailing party, not to counsel. However, as a practical matter, the lawyer is frequently the only person adversely affected when attorney's fees are denied. An indigent client has no real financial interest in whether his attorney is awarded fees. If the client is not indigent, the attorney may still be the party aggrieved in fact, if the client's net recovery is not affected by the amount allowed for fees. When they are the real parties in interests, attorneys are entitled to a day in court.
>
> * * *
>
> "Attorneys who bring civil rights suits on behalf of their clients may be secure in the knowledge that they can pursue any legitimate right they may have to attorney's fees in federal courts."

judgment in evaluating the settlement free from the influence of his or his organization's interest in a fee. DR-5-101(A). Hence, it would seem that plaintiff's counsel confronted by such a demand must ignore his or his organization's interest in a fee and recommend waiver of the fee, if the substantive terms of the settlement are desirable for the plaintiff. Defense counsel thus are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: they make a demand for a benefit which the plaintiff's lawyer cannot resist as a matter of ethics and which the plaintiff will not resist due to lack of interest.

A majority of this Committee believes that it is unethical for defense counsel to exploit this situation in cases arising under statutes aimed at protecting civil rights and civil liberties.[4] We do not

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4 This view apparently is also shared by some govern-

reach the question as it may arise in any other context.

Authorization of fee awards under such statutes is critical to the administration of justice; indeed, it appears

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ment lawyers who defend government entities in suits under civil rights statutes. The Supreme Court has recently agreed to review a decision of the First Circuit interpreting F.R. Civ. P. 59(e) to require that a fee application must be filed within 10 days of the entry of a consent judgment terminating an action brought under 28 U.S.C. § 1983. White v. New Hampshire Department of Employment Security, 49 U.S.L.W. 3863 (May 18, 1981) (No. 80-5887), granting cert to 629 F.2d 697 (1st Cir. 1980). Counsel for New Hampshire conceded that it was their understanding that they were ethically forbidden from holding the settlement of the merits "hostage" to negotiation of a settlement on fees favorable to the state; they assumed that they could not discuss fees until after agreement was reached on the settlement of the merits. White v. New Hampshire Department of Employment Security, supra, petition for a Writ of Certiorari, p. 5, n. 2. We do not find it necessary to reach the question of whether in every type of case in which fees may be awarded to a plaintiff it is ethically improper for counsel to discuss simultaneously the settlement of the merits and the counsel fee award. See Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977) and Mendoza v United States, 623 F.2d 1338, 1352-1353 (9th Cir. 1980). As will become apparent, this opinion turns on a conjunction of principles applicable primarily to litigation protecting civil rights or civil liberties. See Regalado v. Johnson, 79 F.R.D. 447 (N.D. Ill. 1978).

critical to the perception of justice and its accessibility to all members of society. The statutory fee award is a recognition that protections afforded minorities subjected to invidious discrimination or to persons abused by arbitrary governmental action are often meaningless unless counsel can be secured to assist in the enforcement of those rights, and that, typically, victims of such conduct are unable to afford counsel.

In Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968), the Supreme Court said, in connection with an application for attorney's fees under the Civil Rights Act of 1964:

> If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees -- not simply to penalize litigants who deliberately advance arguments they know to be untenable but,

> more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II. [Footnote omitted.]

Lower courts have given similar explanations in cases brought under a variety of statutes for monetary and injunctive relief. See, e.g., Torres v. Sachs, 538 F.2d 10, 13-14 (2d Cir. 1976) (42 U.S.C. § 1973(e)); Nadaeau v. Helgemoe, 581 F.2d 275, 280 (1st Cir. 1978) (42 U.S.C. § 1988); Dennis v. Chang, 611 F.2d 1302, 1306-07 (9th Cir. 1980) (same); Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3rd Cir. 1977) (Age Discrimination in Employment Act). See also 1976 U.S. Code Cong. & Ad. News 5913, reprinting S. Rep. No. 94-1022, 94th Cong., 2d Sess 5, stating the purpose of the law that became 42 U.S.C. § 1988.

> In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced. We find that the effects of such fee awards are ancillary and

> incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance. . . . [It] is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party). [Footnotes omitted; emphasis added.]

In the preamble to the Equal Access to Justice Act of 1980, Congress found:

> that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of the rights in civil cases and in administrative proceedings.

These statutes thus provide one form of response to the need to balance the scales of justice and provide a means for encouraging those who could not otherwise afford to do so a realistic opportunity to enforce their rights. Routine demands in

the context of settlement that plaintiff's counsel waive such statutory fees thus could seriously undermine the effectiveness of these provisions as a device for making counsel available to persons having claims under these statutes.

DR1-102(A)(5) provides:

"A. A Lawyer shall not:

* * *

5. Engage in conduct that is prejudicial to the administration of justice."

Moreover, under the Code of Professional Responsibility every lawyer is urged to support efforts to make counsel available to those unable to afford it. EC 2-25 states:

> "The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession to institute additional programs to provide legal services. Accordingly,

> legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services." (Emphasis supplied.)

In the view of the majority of the Committee, the long term effect of persistent demands for the waiver of statutory fees is to prejudice a vital aspect of the administration of justice and undermine efforts to make counsel available to those who cannot afford it, contrary to the obligations and aspirations of the Code of Professional Responsibility. We find this conclusion particularly compelling in light of the special obligations of government counsel, who in the usual civil rights case are counsel for defendant, to deal fairly and not take undue advantage of his position to bring about unjust settlements or results. EC 7-14. Although this opinion is not limited to

government counsel, we believe the considerations of EC 7-14 add additional force to our conclusion where government counsel is involved.

III

In reaching this conclusion we have considered carefully the views of a substantial minority of the Committee which, although sympathetic to the concerns expressed in this opinion, believes strongly that in prohibiting a specific type of settlement demand aimed at limiting a party's monetary exposure the Committee has invaded the jurisdiction of the courts and the legislature.

The minority considers that reliance on the purpose of these statutes is inappropriate because it is for Congress or the courts to determine whether particular conduct ought to be prohibited as detrimental to the statutory goals. The Committee majority, however, believes that

concerns for statutory goals relating to the administration of justice have been traditionally considered ethical concerns. Thus, in addition to the express concerns of DR1-102(A)(5), the Code of Professional Responsibility concerns itself with a variety of conduct which undermines or obstructs the use of the judicial process. See, e.g., DR-7-102, DR-7-105, DR-7-106(C)(7), DR-7-107, DR-7-108, DR-7-109. Certainly, as a general proposition enforcement of statutory goals is not within the province of ethics committees. However, where, as here, activity of the kind at issue plainly interferes with a specific and clearly articulated legislative goal to facilitate use of the judicial process to enforce fundamental rights, we believe such conduct raises ethical concerns.

A second concern of the minority is that the opinion could interfere with the

settlement process and hence intrudes on an area of special concern to the courts. The minority urges that some defendants, particularly in an action seeking injunctive relief only, might be willing to settle the merits provided they could eliminate or at least limit their monetary exposure on an award of counsel fees, but that they would be unwilling to settle the merits if they faced uncertain monetary exposure for counsel fees. The minority also urges that the ethical rule the Committee announces affects not only defense lawyers, but the defendants themselves -- who are deprived of an opportunity to have their counsel seek a certain type of settlement which would limit the defendants' exposure.

But that result is not unique under the Code of Professional Responsibility and is therefore insufficient to rebut the reasons underlying this opinion. For

instance, the effect of DR 2-108(B) is to bar settlements in which the plaintiff's counsel agrees not to bring on behalf of other plaintiffs actions similar to the one being settled. Such agreements also would be desirable to defendants who seek to limit their future exposure, and it may well be that the Rule inhibits settlements where the defendant fears future suits on the same claim by other plaintiffs. Nevertheless, such settlements are barred because they would induce a conflict between plaintiff's counsel's interest in his own practice and the client's interest in an adequate settlement. See also ABA Informal Opinion 1039 (1968), which reached this conclusion prior to the adoption of DR 2-108(B).

The situation here is analogous in that demands for waiver of the statutory fee generate a conflict between the lawyer's interest in the fee and the

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN V. EVANS, *et al.*,

Petitioners,

—v.—

JEFF D., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN CIVIL LIBERTIES UNION, AND LEGAL AID SOCIETY OF NEW YORK, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

May a court, in determining post-judgment fee entitlement under 42 U.S.C. § 1988 in a case in which only injunctive relief is sought, approve a coerced waiver of all attorneys fees sought by defense counsel on the eve of trial as a condition of providing relief on the merits through a consent decree?

TABLE OF CONTENTS

Page:

Question Presented.....i

Table of Contents.....ii

Table of Authorities.....iii

Interest of Amici.....1

Summary of Argument.....4

Argument.....9

A. The Nature of Civil Rights Practice Makes Civil Rights Lawyers Uniquely Vulnerable to Coerced Waivers of Fees, a Practice Which if Approved Would Result in No Fees Whatsoever.....9

B. Coerced Waivers of Fee Entitlement Under 42 U.S.C. § 1988, Obtained as Prerequite Conditions for Merits Settlements, Contravene the Purposes of the Statute.....19

C. Enforcement of Congress' Intent, by Barring Coerced Fee Waivers, Will not Discourage Settlements or Make More Difficult the Quick Disposition of Nuisance Suits.....39

D. In View of the Federal Courts' Inconsistency in Confronting Coerced Fee Waivers, Specific Guidance Must Be Provided by this Court Barring Coerced Fee Waivers.....51

Page:

Conclusion.....61

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Service Corp. v. Wilderness Society, 421 U.S. 240 (1975) 25, 26

American Family Life Assurance Company v. Teasdale, 733 F.2d 559 (8th Cir. 1984) 46

Arnold v. Burger King Corp., 719 F.2d 63 (4th Cir. 1983) 46

ASPIRA of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975) 31, 32

Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981) 20

Blackledge v. Perry, 417 U.S. 21 (1974) 23

Blum v. Stenson, 465 U.S. ___, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) .....passim

Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974) 1

Cases: Page:

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1944) 20, 21, 52

Cannon v. University of Chicago, 441 U.S. 677 (1979) 36

Carey v. Piphus, 435 U.S. 247 (1978) 11

Charves v. Western Union Telegraph Company, 711 F.2d 462 (1st Cir. 1983) 46

Chattanooga Branch, NAACP v. City of Chattanooga, No. 79-2111 (E.D. Tenn. Dec. 2, 1981), appeal dismissed, Nos. 82-5013 & 82-5016 (6th Cir. April 29, 1982) 56

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 1, 46

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 12

Clanton v. Allied Chemical Corporation, 459 F. Supp. 282 (E.D. Va. 1976) 37

Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) 2, 43

Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980) 44, 45

El Club del Barrio v. United Community Corporations, 735 F.2d 98 (3d Cir. 1984) 54

Cases: Page:

Ellison v. Schilling, Civ. No. L-80-23 (N.D. Ind. July 11, 1983) 42

Ford Motor Company v. EEOC, 458 U.S. 219 (1982) 12

Freeman v. B & B Associates, 595 F. Supp. 1338 (D.D.C. 1984) 54

Gibbs v. Town of Frisco City, 626 F.2d 1218 (5th Cir. 1980) 12

Gillespie v. Brewer, 602 F. Supp. 218 (N.D. W.Va. 1985) 52, 54

Hall v. Cole, 412 U.S. 1 (1973) 21, 28

Hanrahan v. Hampton, 446 U.S. 754 (1980) 24, 31, 34

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 12

Henry v. Gross, 84 Civ. 8399 (TPG) (S.D.N.Y. June 18, 1985) 48

Hensley v. Eckerhart, 461 U.S. 424 (1983) 1, 4, 24, 41, 47

Hutto v. Finney, 437 U.S. 678 (1978) 1, 24, 39, 58

Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974) 31, 32

Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974) 2

Cases: Page:

Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985) 22, 52, 55

Leisner v. New York Telephone Co., 398 F. Supp. 1140 (S.D.N.Y. 1974) 37

Lipscomb v. Wise, 643 F.2d 319 (5th Cir. 1981) 10

Lisa F. v. Snider, 561 F. Supp. 724 (N.D. Ind. 1983) 41, 53

Maher v. Gagne, 448 U.S. 122 (1980) 24, 33, 40

Marek v. Chesny, 53 U.S.L.W. 4903 (U.S. June 27, 1985) 6, 43, 47

Moore v. National Ass'n of Securities Dealers, 762 F.2d 1093 (D.C. Cir. 1985) 52, 55, 59

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 41

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) .....passim

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 24

North Carolina v. Pearce, 395 U.S. 711 (1969) 23

Northcross v. Board of Education of Memphis, 412 U.S. 427 (1973) 1

Oldham v. Ehrlich, 617 F.2d 163 (8th Cir. 1980) 44

Cases: Page:

Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir.), cert. denied, 449 U.S. 839 (1980) 10

Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976), aff'd sub nom., Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977) 31, 32

Pigeaud v. McLaren, 699 F.2d 401 (7th Cir. 1983) 47

Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) 54

Pulliam v. Allen, 466 U.S. ___, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984) 24

Regalado v. Johnson, 79 F.R.D. 447 (N.D. Ill. 1978) 10, 52

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) 47

Schulte v. Gangi, 328 U.S. 108 (1946) 20, 21

Shadis v. Beal, 685 F.2d 824 (3d Cir.), cert. denied, 459 U.S. 970 (1982) 52

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 24

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 6

Cases: Page:

White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982) 1, 34, 35, 41, 60

Wilko v. Swan, 346 U.S. 427 (1953) 22, 52

Statutes and Rules:

Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e, et seq. 11, 13

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 .....passim

Fed R. Civ. P.

Rule 11 47

Rule 12(b) 46

Rule 16 .....58, 61

Rule 23 .....58, 61

Rule 56 46

Rule 68 47

Legislative History:

H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) .....passim

Page:

S. Rep. No. 1011, 94th Cong., 2d Sess. reprinted in 1976 U.S. Code, Cong. & Ad. News 5908 .....passim

Municipal Liability Under 42 U.S.C. § 1983: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) ... .39

Attorney's Fees Awards: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) ... .38

H.R. 5757, 98th Cong., 2d Sess. (1984) 38

S. 2802, 98th Cong., 2d Sess. (1984) 38

Legal Fees Equity Act: Hearings on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. (1984) 38

S. 1580, 99th Cong., 1st Sess. (1985) 39

Ethics Rules and Opinions:

American Bar Association, Model Code of Professional Responsibility

DR 5-101(A) 7

Page:

EC 5-2 7

EC 7-7 7

American Bar Association, Model Rules of Professional Conduct

Rule 1.2(a) 7

Committee on Legal Ethics, The District of Columbia Bar, Opinion No. 147, reprinted in 113 Daily Wash. Law Rptr. 389 (Feb. 27, 1985) 7

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Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 945 (1982) 12

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Page:

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Levin, Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees Are Authorized, 14 Clearinghouse Review 515 (1980) 57

BRIEF FOR AMICI CURIAE
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND,
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,
AMERICAN CIVIL LIBERTIES UNION, AND
LEGAL AID SOCIETY OF NEW YORK

INTEREST OF AMICI [1]

Amici are public interest law organizations that have substantial experience in the litigation of civil rights cases subject to various statutes providing for awards of attorneys fees, particularly the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. We have been involved in many cases, either as counsel for parties or as amicus curiae, which have established basic standards for awarding fees.[2]

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1. Letters consenting to the filing of this Brief have been lodged with the Clerk of Court.

2. E.g., Blum v. Stenson, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983); White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982); Hutto v. Finney, 437 U.S. 678 (1978); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974); Northcross v. Board of Education of Memphis, 412 U.S. 427 (1973); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); [footnote cont'd]

Our interest in the issues presented by this case is two-fold. First, we depend on donated services of attorneys in the private bar to assist us in conducting litigation. In our experience, the potential for fee awards to prevailing parties in such litigation has increased the willingness of the private bar to participate in civil rights cases. To the extent that fees and costs become unavailable even when the party receiving pro bono representation prevails, the availability of donated services will decrease.

Second, we also depend to a substantial degree on fee awards for income necessary to carry out, through our own staff, our programs of providing legal services to the victims of civil rights violations. Thus, the availability of fee awards is essential

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Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974).

both to the continued provision of legal services and to the vigorous enforcement of the civil rights statutes in general.

We are convinced that the judgment of the court below is correct. Allowing defense counsel to offer lawyers for plaintiffs in civil rights or other injunctive actions certain, meaningful relief for their clients -- on condition that statutory fee entitlements be waived -- in theory pits plaintiffs against their attorneys. In fact, long-settled ethical principles, prudence and compassion dictate that plaintiffs' counsel in such cases will be compelled to waive fees. If this tactic is approved by this Court, it would destroy the efficacy of the civil rights acts and would totally undermine the intent of Congress when it made attorneys fees available in such suits.

SUMMARY OF ARGUMENT

Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("the Fees Act"), to increase the availability of counsel to represent plaintiffs in suits brought under applicable federal law[3] by authorizing recovery of reasonable compensation for attorneys' services where plaintiffs prevail on their claims. See generally Blum v. Stenson, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983). In the absence of "special circumstances [which] would render such an award unjust,"[4] the liability of a defendant whose conduct violates a statutory or constitu-

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3. The Fees Act applies to suits under 42 U.S.C. §§ 1981, 1982, 1983, 1985 and 1986, and to suits to enforce provisions of 20 U.S.C. §§ 1681 et seq. or 42 U.S.C. §§ 2000d et seq.

4. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968), quoted with approval in S. Rep. No. 1011, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. Code, Cong. & Ad. News 5908, 5912; and quoted in H.R. Rep. No. 1558, 94th Cong., 2d Sess. 6 (1976).

tional obligation encompassed by the applicable statutes is expanded to include a fee award to the prevailing plaintiff. "If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."[5/]

This case involves perhaps the most extreme factual situation in which government defendants, in a private action brought to compel compliance with these important public policy requirements, seek to avoid their statutory liability under the Fees Act by trying to condition an offer of substantial relief on the merits to plaintiffs upon their lawyers' abandonment of any fee entitlement.

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5. Newman, 390 U.S. at 402, quoted in S. Rep. No. 1011, supra note 4, at 3, reprinted in 1976 U.S. Code, Cong. & Ad. News at 5910; and quoted in H.R. Rep. No. 1558, supra note 4, at 6.

Unlike the "lump sum" offer context in Marek v. Chesny, 53 U.S.L.W. 4903, 4905 (U.S. June 27, 1985), in which the client, in deciding whether to accept a monetary offer of settlement, must confront some necessary reduction of his recovery in order to permit his counsel to be compensated, plaintiffs in an injunctive suit such as in this case will not have their recovery diminished in the slightest by waiving the right to prosecute a statutory fee claim against the defendant. For this reason, when defense counsel in such a case propose a substantial merits settlement conditioned on a fee waiver, they are knowingly presenting the plaintiffs and their attorneys with a "loaded game board"[6/] -- an offer which plaintiffs could have no reason whatever to reject and which their lawyers cannot ethically or morally advise them to

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6. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 (1971).

reject.[7]

It is precisely the devotion of plaintiffs' counsel to their ethical obligations

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7. Plaintiffs in this case are a class of indigent juveniles, committed involuntarily to state institutions, who necessarily had no liability to their Legal Services counsel for either fees or costs. In these circumstances, no attorney could, consistent with his ethical obligation to place the client's interests above his own, advise rejection of merits relief which promised some change in allegedly unconstitutional and dangerous conditions of confinement simply because counsel's costs would not be reimbursed or fees not awarded to him. See American Bar Association, Model Code of Professional Responsibility DR 5-101(A) ("Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests"); id., EC 5-2 ("A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable possibility that they will, adversely affect the advice to be given or services to be rendered the prospective client"); id., EC 7-7 ("[I]t is for the client to decide whether he will accept a settlement offer"); American Bar Association, Model Rules of Professional Conduct Rule 1.2(a) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter"); Committee on Legal Ethics, The District of Columbia Bar, Opinion No. 147, reprinted in 113 Daily Wash. Law Rptr. 389 (Feb. 27, 1985) ("Plaintiff's counsel owes undivided loyalty to the client and is obliged to exercise his judgment in evaluating the settlement free from the influence of his or her organization's interest in a fee. DR 5-101(A)").

to their clients in this, and in similar cases, which places in the hands of defense counsel a potent weapon to defeat the policy underlying the Fees Act. Attorneys in private practice who accept pro bono referrals and who are confronted after years of litigation with coerced waivers of fees are unlikely to continue to provide representation in such cases in the future unless their financial burden is eased in accordance with congressional intent. Public interest law organizations such as amici will be less able to undertake representation in such cases without fee awards when their clients prevail. Thus, allowing defendants to coerce waivers of fee awards as a condition of making available substantial merits relief through settlement will directly impede realization of the purposes of the Fees Act.

ARGUMENT

In civil rights injunctive suits such as this case, federal courts cannot condone, much less enforce, defense efforts to coerce fee waivers by conditioning substantial merits relief for plaintiffs upon counsel's abandonment of statutory fee entitlement.

A. The Nature of Civil Rights Practice Makes Civil Rights Lawyers Uniquely Vulnerable to Coerced Waivers of Fees, a Practice Which if Approved Would Result in No Fees Whatsoever

In order to understand fully the problems that arise when defendants demand a waiver of fees as the price for settling a civil rights case, particularly one in which only equitable relief is sought, it is necessary first to understand the relationship between counsel and client in a typical civil rights suit. That relationship is very different from traditional commercial or contingent fee practices, in which the client un-

dertakes a specific monetary obligation to the attorney, based either upon an agreed (usually hourly or daily) rate, or upon a percentage of the ultimate recovery in cases where monetary relief is sought.

1. In the vast majority of civil rights cases, plaintiffs are unable to pay any fees whatsoever.[8/] Further, by statute, court rule, or Internal Revenue Service regulation, most legal services and legal aid organizations like amici are prohibited from charging fees to their clients.[9/] Occasion-

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8. This fact has been widely recognized by the lower federal courts, see, e.g., Lipscomb v. Wise, 643 F.2d 319, 320 (5th Cir. 1981); Regalado v. Johnson, 79 F.R.D. 447, 451 (N.D. Ill. 1978); and it provided the basic premise for Congress' enactment of the Fees Act, see infra at 23-30.

9. For example, private organizations in New York that provide legal assistance are chartered by the courts as legal aid societies which ordinarily are prohibited from charging fees. Congress specifically intended that such groups receive awards under the Fees Act, see H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 n.16 (1976); Palmigiano v. Garrahy, 616 F.2d 598, 601-02 (1st Cir.), cert. denied, 449 U.S. 839 (1980).

ally, civil rights plaintiffs can afford to pay some of the costs of the litigation or a reduced fee. But in most instances, we reiterate, the client has no written or unwritten duty to compensate counsel for his services.10/

In many civil rights cases, even where monetary relief is demanded, the amounts likely to be recovered will not be large enough to cover the reasonable value of the attorneys' services in the litigation.11/

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10. As noted, civil rights and legal aid organizations may not create such an obligation in a retainer agreement. While private pro bono counsel might do so, plaintiffs in these cases, many of whom have already suffered from harassment by legal or governmental authorities, are often reluctant to sign such agreements. The object of the Fees Act was to make it unnecessary for civil rights plaintiffs to assume fee payment obligations in order to secure counsel.

11. For example, suits to redress the invasion of fundamental constitutional rights may produce only nominal damages, Carey v. Piphus, 435 U.S. 247, 266-67 (1978); the requirement that even a wronged party mitigate his damages may reduce a recovery, see, e.g., 42 U.S.C. § 2000e-5(g) (interim earnings to be deducted from back pay award); in suits against public officials, immunity doctrines and special defenses may limit or even bar the recovery of damages, see, e.g., [footnote cont'd]

Moreover, as is true here and as this Court noted in Newman v. Piggie Park Enterprises Inc., 390 U.S. at 402, many cases involve

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Harlow v. Fitzgerald, 457 U.S. 800 (1982) (qualified immunity); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (punitive damages unavailable from municipal defendants); or the offer of partial relief pendente lite may toll accrual of monetary entitlements, see Ford Motor Company v. EEOC, 458 U.S. 219 (1982). In the typical individual employment discrimination case, the back pay award will be too small plausibly to justify either a contingent fee or a fee premised on reasonable hourly rates for time expended to obtain a favorable result. Most, but not all, Title VII cases have involved lower-level, "blue-collar" positions, see Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 945, 948-49 (1982); since monetary recovery in such cases is restricted to back pay, the amount of recovery is necessarily limited by the lower prevailing salaries for these jobs. Thus, at New York City rates for attorneys with about two years of experience, see Blum v. Stenson, 79 L.Ed.2d at 897 n.4; Bradford v. Blum, 507 F. Supp. 526 (S.D.N.Y. 1981), an individual Title VII case requiring 200 hours of lawyer time for filing, discovery and trial would, if handled by a relatively young attorney, still require a fee of $19,000 exclusive of costs -- more than a year's back pay for many entry-level jobs. Recoveries are generally small even in damage actions for killings brought under 42 U.S.C. § 1983, see, e.g., Gibbs v. Town of Frisco City, 626 F.2d 1218, 1220 (5th Cir. 1980) (plaintiff's son shot and killed by local police; damage award of $12,000 and fee award of $8,000).

only injunctive relief.[12/] All of these cases, however, are precisely the lawsuits whose initiation and litigation Congress wished to encourage through the fee award mechanism of 42 U.S.C. § 1988.

Thus, the typical civil rights lawsuit subject to the Fees Act has the following characteristics: (a) the plaintiff has no or only a very limited obligation either to

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12. Amici do not mean to suggest that serious ethical and public policy problems do not exist in cases where relief other than an injunction is at issue. In litigation enforcing Title VII of the Civil Rights Act of 1964, it is now increasingly common for defendants to offer a lump sum representing back pay and fees in total settlement of a case. Since it is rare that the lump sum is sufficient both to cover the individual back pay claims of the class members (so as to make them whole) and to compensate their attorneys, the interests of the class members are pitted against those of their attorneys. And since these actions are class actions in which there is no contractual obligation on the part of either the named plaintiffs or the class itself to pay fees, the conflicts cannot be resolved by submission to the clients.

The Court is not faced with such questions in the case before it, however, and we limit our discussion in this Brief to demands for complete waiver of fee entitlements in suits where no monetary relief has been sought but in which defendants offer substantial merits relief.

provide funds for the costs of litigation or to compensate his counsel for legal services; and (b) once the attorney-client relationship comes into being, plaintiff's counsel owes his client the same quality, zeal and efficacy of representation which he would provide to a paying client, as required in bar disciplinary codes. Recognizing these facts, Congress created, in the Fees Act, an obligation of unsuccessful defendants in civil rights cases to compensate plaintiffs' attorneys for their services, in order to encourage and attract lawyers to provide representation in these cases.

2. Given this context, the problems faced by plaintiffs' counsel when the issues on the merits of a case and the availability of attorneys fees are linked, in a single offer proposing waiver of the latter in exchange for substantial relief on the former,

are totally different than in ordinary tort or commercial litigation.

For example, in a personal injury case where there is a contingent fee retainer, client and counsel will share proportionately in any recovery and the client's decision whether to accept a settlement will be subject to the client's obligation to share the proceeds with his attorney. While some differences of opinion may persist which are detrimental to the attorney's interest in maximizing his remuneration, see Br. for U.S. at 24-25, civil rights suits in which a fee waiver is demanded differ from this situation in at least two very significant respects. (a) So long as there is some recovery for the client, there is some recovery for counsel; the two are inextricably linked and cannot be manipulated one against the other by defense counsel. (b) There is no strong public policy, much less a federal statute, providing

that counsel for successful plaintiffs should receive reasonable compensation for their time and effort, to be paid by the defendant.

Similarly, in a case in which the client has agreed to compensate his counsel at an established rate, irrespective of the results of the litigation, the relationship between attorney and client is impervious to the tactics of defense lawyers and is unaffected by any public policy, save that favoring its confidentiality.

In each of these situations, while differences may occur, the personal and professional interests of counsel are at least generally aligned with the interests of the client when a settlement is proposed. In the typical civil rights case, however, the situation is diametrically opposite. Because the client is under no financial obligation to pay the attorney, a settlement offer of substantial merits relief conditioned upon a

fee waiver necessarily places the personal interest of the attorney, the professional interest of the attorney, and the interest of the client, in conflict. As the Committee on Legal Ethics of the District of Columbia Bar aptly put it, supra note 7:

> Defense counsel thus are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: They make a demand for a benefit that the plaintiff's lawyer cannot resist as a matter of ethics and one in which the plaintiff has no interest and therefore will not resist.[13]

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13. These concerns are not abstract or theoretical. Amici and the attorneys with whom they work have experienced the problems outlined above in many different contexts. In fact, we recently have all been repeatedly faced with the impossible choice between obtaining relief for our clients and forfeiting our statutory entitlement to the fees that would enable us to bring other actions to enforce civil and constitutional rights.

For our cooperating attorneys who are in private practice and, therefore, dependent on fees for their very livelihood, the problem is even more severe. We know of attorneys who have abandoned civil rights practice because of the widespread use of tactics such as those employed by the petitioners' attorneys in the present case. The combination of the loss of income and the continued threat of being placed in ethical dilemmas has forced attorneys, otherwise willing to be involved in the enforcement of the civil rights laws, [footnote cont'd]

Under our adversary system of litigation, counsel are encouraged to compromise claims favorably to their clients even if the result is to afford somewhat more or less than complete and exact compensation to the victim of wrongdoing. Petitioners and their amici are frank to advise this Court, however, that they read prevailing principles to require defense counsel to seek a waiver (not a compromise) of fees as part of any settlement in a civil rights case.[14/] The issue in this case is thus whether coercing a fee waiver in settlement of a case subject to the Fees Act is consistent with that statute --

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to abandon this phase of their practice or to limit it to those few clients who can contract to pay a full fee out of their own pockets.

14. See, e.g., Pet. Br. at 31-35; Br. of Alabama, et al., at 52-53; U.S. Br. at 23; City of New York Br. at 13; but see Br. of Council of State Governments, et al., at 4 ("The narrow question presented to the court of appeals for review in this case was the propriety of defendant's insistence on a waiver of plaintiff's attorney's fees as a condition of settlements. Amici take no position with respect to this issue").

and it is to that question which we now turn.

B. Coerced Waivers of Fee Entitlement Under 42 U.S.C. § 1988, Obtained As Prerequisite Conditions for Merits Settlements, Contravene the Purposes of the Statute

Petitioners and their amici argue that coerced fee waivers are permissible merely because the Fees Act does not bar them in haec verba.[15/] These arguments, however, wholly overlook Congress' purposes in enacting the Fees Act.

1. It has never been the rule that a statutory scheme may be vitiated and congressional purposes frustrated through ingenious construction or devious stratagems which were neither anticipated nor explicitly prohibited at the time of enactment. For example, this Court has long refused to permit the direct

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15. See Pet. Br. at 12-13; Br. of Equal Employment Advisory Council at 8-9; Br. for Alabama, et al., at 14-17; U.S. Br. at 21-22.

or indirect waiver of the minimum wage requirements of the Fair Labor Standards Act. E.g., Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981); Schulte v. Gangi, 328 U.S. 108 (1946); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1944). In its opinion in the seminal case in this line, O'Neil, the Court justified its decision on the basis of the overall policy goals of the statute:

> Neither the statutory language, the the legislative reports nor the debates indicates that the question at issue was specifically considered and resolved by Congress. In the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by its legislative history and the provisions in the structure of the Act.

324 U.S. at 705-06 (footnotes omitted). Indeed, O'Neil is particularly apt since the congressional purpose underlying the Fair Labor Standards Act was to ameliorate the

results flowing from bargaining between economically unmatched and unequal interests:

> The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.... No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

Id. at 706-07 (footnote omitted).16/ The

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16. It is the peculiar history of the Fair Labor Standards Act, as construed by this Court in O'Neil and Schulte, rather than some generically different approach to writing statutes, which thus accounts for the unusual language of 29 U.S.C. § 253(a), relied upon by the Solicitor General, see U.S. Br. at 21. That section of the Portal-to-Portal Pay Act was drafted to overrule O'Neil and Schulte as to liquidated, but not compensatory damages, and it was prompted by the specific circumstances in which those cases arose. It would be ludicrous to suggest that after those decisions, it was incumbent upon Congress to add similar language to every federal statute which created rights enforceable by individuals. Cf. Hall [footnote cont'd]

same inequalities of access and bargaining power motivated Congress' enactment of the Fees Act.[17]

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v. Cole, 412 U.S. 1 (1973) (attorneys' fees awarded in suit to enforce statute despite absence of explicit statutory authorization). Moreover, no suggestion has been advanced by petitioners or their amici, and none can be supported in the legislative history, that the Congress which passed the Fees Act intended to authorize defendants to coerce fee waivers in settlements.

It is equally significant that the decision in Wilko v. Swan, 346 U.S. 427 (1953), also cited in U.S. Br. at 21-22, likewise relied upon the general purposes of the Securities Act rather than any provision explicitly addressing arbitrability:

> Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

346 U.S. at 438 (footnote omitted and emphasis added).

17. The suggestion of Judge Torruella in Lazar v. [footnote cont'd]

2. Congress' primary purpose in enacting the Fees Act was to attract competent counsel to represent victims of civil rights violations who otherwise would be unable to gain access to the courts, and thereby to provide a mechanism for actual civil rights enforcement. This overriding goal emerges clearly from an examination of the legislative history of the Fees Act.[18]

Pierce, 757 F.2d 435, 439 (1st Cir. 1985), endorsed by petitioners and their amici -- that the statutory fee entitlement under the Act must be waivable since even in the criminal sphere, federal constitutional rights are subject to waiver -- is a non sequitur. The issue is whether the defendant may coerce such a waiver as the price for agreeing to substantial relief on the merits. In the criminal area, it is thoroughly settled that a prosecutor may not coerce waiver of constitutional rights as the price of some other agreement with the defendant. E.g., Blackledge v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 711 (1969).

18. Despite their broad contentions, petitioners studiously avoid any examination of the legislative history, with the exception of four minor and misleading cites to H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976). See Pet. Br. at 13. Petitioner's amici similarly avoid any review of the legislative history. For example, although the Solicitor General advances a [footnote cont'd]

Running throughout the legislative history, particularly the Reports accompanying the Fees Act legislation,[19] are three recurrent themes. (a) The victims of civil rights

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congressional intent argument in his U.S. Br. at 20-21, nowhere in the argument is there any reference to the language of the Fees Act or to its accompanying legislative history.

The overriding importance accorded the legislative history accompanying the Fees Act is illustrated by, e.g., Pulliam v. Allen, 80 L.Ed.2d 565, 570 & n.4, 580 & n.23 (1984) (relying on the House Report at 9); Blum v. Stenson, 79 L.Ed.2d 891, 898-900 (1984) (relying on the Senate Report at 6); Hensley v. Eckerhart, 461 U.S. 424, 429-34 & nn.2, 4, 7 (1983) (relying on the Senate Report at 4, 6; and on the House Report at 1, 7); Maher v. Gagne, 448 U.S. 122, 129, 132 n.15 (1980) (relying on the Senate Report at 5; and on the House Report at 4 n.7); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70-71 n.9 (1980) (relying on the House Report at 5, 8 n.16); Hanrahan v. Hampton 446 U.S. 754, 756-58 (1980) (relying on the Senate Report at 2, 5; and on the House Report at 4, 7, 8); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 737-39 & n.17 (1980) (relying on the Senate Report at 4; and on the House Report at 9); Hutto v. Finney, 437 U.S. 678, 694 n.23 (1978) (relying on the House Report at 4 n.6).

19. The Senate and House Reports are, respectively: S. Rep. No. 1011, 94th Cong., 2d Sess. (1976) [hereinafter "Senate Report"], reprinted in 1976 U.S. Code, Cong. & Ad. News 5908-14; and H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) [hereinafter "House Report"], reprinted in E. Larson, Federal Court Awards of Attorney's Fees, 288-312 (1981).

violations are ordinarily unable to afford lawyers, and are thus ordinarily unable to gain access to the courts. (b) Effective civil rights enforcement depends upon actions initiated by private plaintiffs and thus depends upon encouraging private lawyers, through the availability of court-awarded attorneys fees, to represent plaintiffs in private suits. (c) For these reasons, fee awards are essential if our Nation's civil rights statutes are to be enforced.

a. The Senate Report at 2 recognized at the outset that in "many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." This lack of financial resources, coupled with this Court's rejection of the "private attorney general" doctrine in Alyeska Pipeline Service Corp. v. Wilderness Society, 421 U.S. 240 (1975), effectively precluded access to

the courts. The House Report at 2 made clear that "civil rights litigants were suffering very severe hardships because of the Alyeska decision." "[P]rivate lawyers were refusing to take certain types of civil rights cases," and civil rights organizations, "already short of resources, could not afford to do so" either. Id. at 3. For victims of civil rights violations, the situation was indeed bleak: "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to courts." Id. at 1.

Congress responded by authorizing court-awarded fees as a financial incentive to attract counsel to represent persons whose rights had been violated. "In authorizing an award of reasonable attorney's fees [the Fees Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to

law." House Report at 1. "This bill ... provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing [civil rights] statutes." Senate Report at 6.

b. Congress thoroughly understood that most of our "civil rights laws depend heavily upon private enforcement," Senate Report at 2, for the obvious reason that "there are very few provisions in our Federal laws which are self-executing." Id. at 6. "The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." House Report at 1. In creating the incentive of fee awards to facilitate the functioning of the enforcement mechanism, Congress made "fees ... an integral part of the remedy necessary to achieve compliance with our statutory [civil rights] policies." Senate Report at 3. Congress did so consciously and

purposefully. It was aware of Hall v. Cole, 412 U.S. 1, 13 (1973), in which this Court endorsed a fee award in a union member's suit to enforce the Landrum-Griffin Act because: "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose." Senate Report at 3. Similarly, both Reports quoted from this Court's decision in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968): "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts." Senate Report at 3; House Report at 6. Finally, the legislative history demonstrates that Congress reviewed the enforcement success achieved through fee-shifting provisions in other civil rights statutes: "These fee-shifting provisions

have been successful in enabling vigorous enforcement of modern civil rights legislation." Senate Report at 4.

c. The legislative history leaves no doubt that Congress believed fee awards to be essential both to secure future legal representation for aggrieved individuals and to create an ongoing mechanism for civil rights enforcement in general. As summarized in the Senate Report:

> "[C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."

Id. at 2 (emphasis added); "fee awards are essential if the Federal statutes to which [the Fees Act] applies are to be fully enforced," id. at 5 (emphasis added); fee awards "are necessary if citizens are to be able to effectively secure compliance with these existing statutes," id. at 6 (emphasis

added); "[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases," id. (emphasis added).

In sum, Congress enacted the Fees Act to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights," and thereby "to promote the enforcement of the Federal civil rights acts, as Congress intended." House Report at 9.

3. It is also evident that Congress intended to make fee awards available to counsel who further private enforcement of national civil rights laws by successful resolution of lawsuits through settlement rather than formal adjudication.

The Fees Act "by its terms ... permits the award of attorney's fees only to a 'prevailing party.'" Hanrahan v. Hampton, 446 U.S. 754, 756 (1980). Giving meaning to this statutory phrase, the legislative history demonstrates Congress' intent to make fee awards available after a party "prevails" through settlement as well as through trial. The House Report at 7 states:

> The phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974); Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976); Aspira [sic] of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion.

By equating success through settlement or a consent decree with success through judgment following a full trial, and particularly by emphasizing that a prevailing party should not be penalized by a denial of fees for seeking an out-of-court settlement, Congress certainly did not intend to diminish statutory fee entitlement, much less obliterate it. Congress instead meant nothing less than what it said: fee entitlement follows the achievement of prevailing party status won through settlement or a consent decree.[20/]

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20. The three cases relied on in the House Report at 7 further illustrate Congress' intent. In two of the cases, the consent decrees addressed and resolved the merits of the litigation without any reference to attorneys fees. Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974), aff'g 376 F. Supp. 483 (N.D. Ohio 1973); ASPIRA of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975). The consent decree in the third case reserved the fee issue for later resolution by the court. Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976), aff'd sub nom., Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977). Significantly, in all three cases, fee entitlement was held to flow from the fact, and after the fact, of the plaintiffs having achieved prevailing party status.

The Senate Report, albeit less elaborately, confirms this interpretation. After noting that fee awards are "appropriate where a party has prevailed on an important matter in the course of litigation," the Senate Report at 5 further states: "Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." Once again, according to Congress, a plaintiff's achievement of prevailing party status means that fee entitlement follows.

4. This basic congressional intent was recognized by this Court in Maher v. Gagne, 448 U.S. 122, 129 (1980), where the Court held that the "fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees." The Court further observed:

> Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, p. 5 (1976).

Id. See also Hanrahan v. Hampton, 446 U.S. at 756-57 (quoting with approval the House and Senate Reports). And in White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), the Court held that a post-consent decree fee motion was not a Fed. R. Civ. P. Rule 59(e) motion to alter or amend a judgment on the merits because § 1988 "provides for awards of attorney's fees only to a 'prevailing party,'" id. at 451, fee entitlement "under § 1988 raises issues collateral to the main cause of action," id. (footnote omitted), and any "decision of entitlement to fees will therefore require an

inquiry separate from the decision on the merits -- an inquiry that cannot even commence until one party has prevailed," id. at 451-52.[21]

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21. Also in White, as petitioners and their amici here are fond of pointing out, this Court "decline[d] to rely on" plaintiff's alternative "reason for finding Rule 59(e) inapplicable to post-judgment fee requests": that "prejudgment fee negotiations could raise an inherent conflict of interest between the attorney and client," and that "to avoid this conflict of interest any fee negotiations should routinely be deferred until after the entry of a merits judgment." Id. at 453-54 n.15. Apart from the fact that resolution of this alternative argument was no longer necessary in view of this Court's favorable ruling for plaintiff-petitioner on the meaning of Rule 59(e) given that fee entitlement is "collateral to the main cause of action," id. at 451, the fact of the matter is that this Court, in a footnote, "decline[d]" to rule on this simulatenous negotiation argument, and in fact said little more than that a defendant deciding whether to settle a case on the merits "may have good reason to demand to know his total liability from both damages and fees":

> Although sensitive to the concern that petitioner raises, we decline to rely on this proffered basis. In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.

Id. at 453-54 n.15. This is far from any endorsement [footnote cont'd]

Thus, under the statutory scheme, fee entitlement follows from the precondition of achieving prevailing party status through trial or settlement. Petitioners' tactic of demanding a fee waiver as the price for the defendant's execution of a settlement agreement on the merits, which establishes a plaintiff's prevailing party status, thus turns the law on its head.[22/] Judicial ap-

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of petitoner's request here for judicial approval of a coerced waiver of fees altogether, a situation not presented in White.

22. Petitioners' suggestion that Congress enacted the Fees Act cognizant of federal court decisions that "had interpreted Title II and VII to allow [defendants to coerce] plaintiffs to waive attorney's fees" and intended to incorporate "this judicial gloss on the parallel statutes" into the Fees Act, Pet. Br. at 13, is unsupportable. Congress directed attention specifically to "existing judicial standards, to which ample reference is made in this report," House Report at 8 (emphasis added); and Congress illustrated those standards by directing that fees be awarded where plaintiffs prevail through settlements or consent decrees, House Report at 7 and Senate Report at 5, see supra at 31-35. Cf. Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979).

In any event, the two pre-Fees Act cases cited by petitioners do not concern waiver at all. One gave simultaneous approval of settlements of the merits and fees, without indicating whether both subjects were [footnote cont'd]

proval of petitioners' approach would have the undeniable effect of removing fee entitlement from virtually all cases where plaintiffs prevail through settlements or consent decrees.[23] This, however, would be directly contrary to Congress' injunction that a "'prevailing' party should not be penalized for seeking an out-of-court settlement." House Report at 7. And, contrary to Congress' directions, it would eliminate fee entitlement from a large category of cases in which Congress intended fees to be awarded.

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discussed in the same negotiations, and without any mention of a fee waiver. Leisner v. New York Telephone Co., 398 F. Supp. 1140, 1142 (S.D.N.Y. 1974) ("Defendant has admitted nothing in terms of liability but has agreed to a compromise guaranteeing substantially all the affirmative relief sought by plaintiffs, and further agreed under 'II.A.' to 'Payments ... to Plaintiffs and their Attorneys ...'") (emphasis added in part). In the other case, Clanton v. Allied Chemical Corporation, 459 F. Supp. 282 (E.D. Va. 1976), the settlement agreement provided not for a fee waiver but for the court to determine fee entitlement. Id. Indeed, all of the pre-Fees Act cases cited, see House Report at 7, involved bifurcated negotiations with the Court determining the fee, as in Clanton.

23. See supra note 14 and accompanying text.

Thus, not only is the position of petitioners and their amici not supported by the express purposes of the Fees Act, it is directly contrary thereto. It is consistent, however, with the persistent and unsuccessful efforts of the Department of Justice, the National Association of Attorneys General, and other government representatives to convince Congress to amend the Fees Act to limit drastically the availability of attorneys fees against government agencies.[24] To date, they have been unable to get a bill out of committee in either house.[25]

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24. See e.g., Attorney's Fees Awards: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982); Municipal Liability Under 42 U.S.C. § 1983: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981).

25. The latest effort to limit drastically fee awards against government agencies is legislation entitled the "Legal Fees Equity Act," which was drafted by the Justice Department and which was introduced in the 98th Cong., 2d Sess. (1984) as S. 2802 and H.R. 5757. Hearings were held only on the Senate bill, Legal Fees Equity Act: Hearings on S. 2802 Before the Subcomm. [footnote cont'd]

The present case is but the latest in a series of equally unsuccessful government efforts[26] to have this Court interpret the Fees Act in such a way as to cripple private civil rights enforcement.

C. Enforcement of Congress' Intent, by Barring Coerced Fee Waivers, Will Not Discourage Settlements or Make More Difficult the Quick Disposition of Nuisance Suits

Notwithstanding Congress' clearly expressed purposes in enacting the Fees Act, petitioners and their amici argue strenuously that restricting the ability of defense coun-

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on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. (1984), but the bill was not even voted out of subcommittee.

This same legislation was recently reintroduced as S. 1580, 99th Cong., 1st Sess. (1985); see 131 Cong. Rec. S10876 (daily ed. Aug. 1, 1985). The section-by-section analysis states that this new bill is not "intended to preclude discussions between the parties of attorneys fees, or the waiver thereof, before the decision on the merits ... or to prevent the government from discussing liability for attorneys' fees in conjunction with liability on the merits as part of a settlement agreement." Id. at S10881.

26. See, e.g., Blum v. Stenson, and the U.S. Br. therein; Hutto v. Finney.

sel to press for fee waivers as part of overall settlements will have dire consequences for our judicial system, defeating salutary policies favoring compromise and settlement of litigation and burdening the courts with frivolous, "nuisance" litigation. These assertions are devoid of merit.

1. As to settlements in general, it is an historical fact that counsel in many earlier civil rights cases followed a bifurcated approach, settling the merits first and thereafter resolving the matter of fees. This is precisely what occurred in the three settled cases cited with approval in the House Report at 7.[27] It also is what occurred in Maher v. Gagne 448 U.S. 122, 126 (1980) (the "parties informally agreed that the question whether [plaintiff] was entitled to recover attorney's fees would be submitted

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27. See supra note 20 and accompanying text.

to the District Court after entry of the consent decree"); in White v. New Hampshire Department of Employment Security, 455 U.S. 445, 447-48 (1982) (the parties first negotiated a settlement, and thereafter sought to negotiate fees, with the district court ultimately awarding fees); and in hundreds of other civil rights cases including Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), cited with approval in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

Even more compelling is the fact that court orders barring defense counsel from conditioning an offer of settlement upon a coerced waiver of fees have not deterred settlement. For example, in Lisa F. v. Snider, 561 F. Supp. 724 (N.D. Ind. 1983) (Civ. No. S-79-103), where the government defendants, after four years of litigation, proposed a settlement on the merits conditioned upon a coerced waiver of fees, and

where the court ordered any negotiation on the merits to be conducted "separate from the question of the plaintiff's entitlement to attorney fees," id. at 726, this order did not deter settlement. Less than six months later, the parties settled the case on the merits favorably to the plaintiff. Order of September 15, 1983. Thereafter, fee negotiations commenced, no agreement on fees was reached, the matter was submitted to the district court, and the court ultimately awarded fees to plaintiff's counsel. Order of February 8, 1985.[28/]

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28. Similar results have occurred in many other cases. For example, the same private attorney who represented the plaintiff in Lisa F. represented the plaintiffs in another § 1983 class action, Ellison v. Schilling, Civ. No. L-80-23 (N.D. Ind. consent decree entered on July 11, 1983), a case in which another set of government defendants sought a coerced waiver of fees from this private attorney after nearly three years of litigation. Plaintiffs immediately thereafter filed a motion seeking an order barring simultaneous negotiation; the district court granted plaintiffs' motion in an unreported order filed on April 6, 1983; the parties then negotiated a settlement on the merits favorable to plaintiffs, and the court approved the consent decree on July 11, 1983; following unsuc-
[footnote cont'd]

Rather than deterring settlement, the certainty of defendants' liability for fees in meritorious cases not only provides a powerful incentive for defense counsel to assess the strength of a case early and to settle, cf. Marek v. Chesny, 53 U.S.L.W. at 4904, but also serves to deter potential wrongdoers from violating the law in the first place. These principles were repeatedly enunciated by the courts of appeals that ruled, prior to this Court's decision in Blum v. Stenson, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), that legal aid organizations were entitled to fee awards computed on the same basis as those for private counsel. As stated by the en banc court of appeals in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980), if market fees could not be awarded when "a public interest law firm serves as

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cessful settlement negotiations as to fees, the court awarded fees to plaintiffs' attorney on April 10, 1985.

plaintiff's counsel," then

> the defendant will be subject to a lesser incentive to settle a suit without litigation than would be the case if a high-priced private firm undertook plaintiff's representation. That is so because the marginal cost of each hour of continued litgation would be reduced. Defendant's counsel could inundate the plaintiff with discovery requests without fear of paying the full value of the legal resources wasted in response. We do not think that Title VII intended that defendants should have an incentive to litigate imprudently.

Id. at 899 (citation omitted). Additionally, the "incentive to employers not to discriminate is reduced if diminished fee awards are assessed." Id. See also, e.g., Oldham v. Ehrlich, 617 F.2d 163, 168 (8th Cir. 1980) (with the focus "on deterring misconduct by imposing a monetary burden on the wrongdoer, a legal aid organization merits an attorney's fee fully as much as does the private attorney"); Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980) (a full fee "award encourages potential defendants to comply with civil

rights statutes"). As the Ninth Circuit also correctly observed in Dennis, 611 F.2d at 1307: "if the state could immunize itself against a fee award ... the state would have less incentive to settle pending litigation and more incentive to resist civil rights compliance by defending against the suit until trial."

2. Just as a rule barring coerced fee waivers will not deter settlement of meritorious cases, neither will such a rule -- whether through a Lisa F. order or otherwise -- deter settlement or early disposition of frivolous cases or nuisance suits. In dealing with these suits, defense counsel in fact possess a considerable array of permissible tactics provided by federal rules and statutes.

Where a matter truly is frivolous at the outset as a matter of law, defense counsel may quickly have the case resolved under Fed. R. Civ. P. Rule 12(b) by filing a dispositive motion to dismiss or for judgment on the pleadings. Alternatively, where defense counsel choose to address matters outside of the pleadings, they may quickly have the frivolous case resolved under Fed. R. Civ. P. Rule 56 by filing a dispositive motion for summary judgment. In either event, defense counsel may seek and obtain an award of attorneys fees from plaintiffs so long as the case was in fact frivolous. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). These fee awards, which are often substantial,[29/] pose a strong deterrent to

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29. See, e.g., American Family Life Assurance Company v. Teasdale, 733 F.2d 559 (8th Cir. 1984) (fee award of $63,000 assessed against plaintiff under § 1988); Arnold v. Burger King Corp., 719 F.2d 63 (4th Cir. 1983) (fee award of more than $10,000 assessed against plaintiff under Title VII); Charves v. Western Union Telegraph Company, 711 F.2d 462 (1st Cir. 1983) (fee [footnote cont'd]

frivolous litigation. And, as if additional tools were needed to deter nuisance litigation, fees may always be assessed against counsel personally for bad faith litigation, Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), and fees now may also be assessed against counsel under Fed. R. Civ. P. Rule 11 for frivolous litigation.30/

3. Given this arsenal of procedural devices available both to dispose of truly frivolous cases and to obtain compensation for defending them, it is apparent that de-

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30. Defense counsel also have available yet another permissible tactic: they are free to make an early offer of judgment under Fed. R. Civ. P. Rule 68 without specifically including a fee component. If the offer is accepted, the available attorneys fees will be small, Hensley v. Eckerhart, 461 U.S. 424 (1983), and may even be unavailable altogether, Pigeaud v. McLaren, 699 F.2d 401 (7th Cir. 1983). If the offer is unreasonably rejected and the plaintiff fails to secure a superior result, no fees would be available from the date of the offer, Marek v. Chesny, 53 U.S.L.W. 4903 (U.S. June 27, 1985), and the available fees again would be small, Hensley.

fense counsel's concern is not the frivolous case but the meritorious case. For example, in a meritorious case recently brought by amicus Legal Aid Society of New York against the City of New York -- and contrary to the impression conveyed to this Court in its Brief in this case -- the City declined a prelawsuit settlement, waited until the eve of trial to invoke its policy of offering a settlement conditioned upon a total waiver of fees, and ultimately was held liable after trial for greater relief and for fees.[31/] In

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31. This chronology occurred in Henry v. Gross, 84 Civ. 8399 (TPG) (S.D.N.Y. June 18, 1985) notice of appeal filed, (2d Cir. July 18, 1985). Two months before the suit was filed, Legal Aid lawyers, pursuant to established Legal Aid policy (similar to the policy required of all grantees of the federal Legal Services Corporation), sent the New York City Department of Social Services a letter describing the claims by a class of welfare recipients of improper termination of benefits without hearings, and inviting the City to take voluntary remedial action. This of course gave the City ample opportunity "as a matter of policy or practical judgment ... to dispose of the matter [with a] ... substantial reduction of attorneys' fees." Br. for City of New York at 11. Nevertheless, the Department of Social Services rebuffed this attempt, and suit was thus filed. Some four-and-a-half months [footnote cont'd]

fact, in amici's experience, it is precisely in meritorious cases in which plaintiffs' claims on the merits are strong that the use of coerced fee waivers is most prevalent.[32/]

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later, after discovery and after motions for class certification and for a preliminary injunction had been filed, and on the eve of a trial, the City made an incomplete merits settlement offer which was somewhat favorable on the merits but conditioned upon a complete waiver of fees under § 1988. Despite the trial court's oral suggestions to the City that this negotiating tactic was improper, the City refused to negotiate separately and decided to risk going to trial rather than agree to pay reasonable fees. After a three-day trial, the trial court awarded plaintiffs sweeping relief on the merits -- relief substantially more favorable than that proposed in the City's withdrawn settlement offer -- and the court also assessed fees against the City.

This is not an isolated example. Amicus Legal Aid Society of New York has in other meritorious cases been confronted with New York City's practice of seeking coerced fee waivers, ordinarily after substantial litigation has taken place, and usually on the eve of trial.

32. While at first blush it might seem that offers of substantial merits relief in exchange for fee waivers would only be made in weak cases, the opposite is true. Unlike ordinary commercial or tort litigation, or even individual Title VII cases, weak class action cases under § 1983 are rarely settled; the government agency usually prefers to fight the case on the merits rather than restructure its operations. It often decides that the costs of litigation, conducted by staff counsel and assisted by paid employees in the affected agency, are lower than the costs of structured relief. [footnote cont'd]

Since this case is neither frivolous nor a nuisance suit but rather a substantial case involving a wholly illegitimate effort by petitioners to evade fee liability imposed by statute, approval by this Court of the tactic followed by petitioners in seeking a coerced waiver of all fees in this case would necessarily allow all defense counsel to extract coerced fee waivers in all settlements, and it would thus eliminate the very incentive provided by Congress for enforcement of and compliance with our civil right laws.

It is thus in the strong cases that waiver demands from governmental entities are most common. Facing long-term, structual relief after substantial litigation, defendants in these cases are most eager to reduce their costs by limiting what they know will be a large attorneys fee bill. Accordingly, just prior to trial they will often offer some relief on the merits contingent on a fee waiver. This behavior is often reinforced by attitudes about local autonomy and resistance to "outside do-gooders" that make anathema the idea of liability for the plaintiffs' attorneys fees. The result is that it is precisely in the cases where plaintiffs are most likely to prevail that fees waiver requests are most common.

D. In View of the Federal Courts' Inconsistency in Confronting Coerced Fee Waivers, Specific Guidance Must Be Provided by this Court Barring Coerced Fee Waivers

As is apparent from the lower court rulings on the general subject before this Court, and from the submissions of petitioners and their amici in this case, the federal courts to date have neither followed uniform standards nor developed procedures sufficient to insure that the purposes of the Fees Act are not defeated through merits settlements conditioned upon coerced fee waivers. This Court's clear guidance to the district courts is necessary if the congressional intent to facilitate meritorious civil rights litigation is to be realized.

Of course, the ruling by the court of appeals in this case goes no further than to hold that defendants offering substantial merits relief in a nonmonetary Fees Act case may not condition settlement upon a complete

fee waiver. This reading of the statute has ample support in this Court's decisions. See, e.g., Wilko v. Swan, 346 U.S. 427 (1953); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1944). Yet, some courts have been reluctant to adopt such a rule because of fear that it would permit a "secret plan to rescind," Lazar v. Pierce, 757 F.2d 435, 438 (1st Cir. 1985).[33] Given this perspective, and especially given the occasional judicial

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33. Compare Regalado v. Johnson, 79 F.R.D. 447 (N.D. Ill. 1978) (refusing to hold, in light of the public policy underlying the Fees Act, that silence as to fees in a settlement agreement amounted to a fee waiver); Gillespie v. Brewer, 602 F. Supp. 218, 226-28 (N.D. W.Va. 1985) (refusing to enforce a fee waiver provision in a settlement agreement); Shadis v. Beal, 685 F.2d 824 (3d Cir.), cert. denied, 459 U.S. 970 (1982) (voiding on public policy grounds a provision in a funding contract between the state and a legal services grantee requiring the grantee to waive fee awards in suits against governmental entities); with Moore v. National Ass'n of Securities Dealers, 762 F.2d 1093, 1095-97, 1105 n.17 (D.C. Cir. 1985), petition for rehearing pending (affirming a denial of post-consent decree fee petitions where counsel and plaintiff made no objection at a hearing on the fairness of the decree which included a waiver provision, and suggesting counsel's obligation to bring any overreaching tactics to the attention of a court prior to approval of settlement); Lazar v. Pierce (semble).

reluctance to confront the coerced fee waiver issue early and directly, there is a compelling need for clear guidance from this court.

1. The judicial response to defense counsel tactics of simultaneous negotiation in general and of coerced waivers in particular -- as demonstrated in reported opinions, in unreported orders, and in unreported refusals to act -- has been varied and inconsistent. Where judicial assistance has been sought early, some courts have barred coerced waivers in simultaneous negotiations; other courts have responded not at all; and yet others have implied approval.

The most effective case-by-case procedure for responding to unfair defense tactics is a court order, as in Lisa F. v. Snider, 561 F. Supp. 724, 726 (N.D. Ind. 1983), directing that any negotiations on the merits be conducted "separate from the question of

the plaintiff's entitlement to attorney fees." This type of court order grows out of the Third Circuit's general prohibition against simultaneous negotiation, as set forth in Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977). Although that decision arose in the context of a "sweetheart" settlement rather than a "sacrifice" case, the Third Circuit has recognized the applicability of the Prandini principles to the sacrifice situation as well, El Club del Barrio v. United Community Corporations, 735 F.2d 98 (3d Cir. 1984), and other courts have applied the principles to bar coerced fee waivers.[34/]

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34. See, e.g., Gillespie v. Brewer, 602 F. Supp. 218 (N.D. W.Va. 1985); Freeman v. B & B Associates, 595 F. Supp. 1338 (D.D.C. 1984); see also Opinion No. 80-94, Committee on Professional and Judicial Ethics of New York City Bar Ass'n, 36 Record of New York City Bar Ass'n 507 (Nov. 1981), amended and reissued in Opinion No. 82-80 (Dec. 1983); Kraus, Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases under the Civil Rights Attorney's Fees Awards Act of 1976, 29 Vill. L. Rev. 597, 638-48 [footnote cont'd]

Without a governing Prandini-type bar against simultaneous negotiation, however, some courts have been reluctant to act at all when defense counsel seek a coerced waiver. For example, when plaintiff's attorney in Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985), was confronted with defense counsel seeking a coerced waiver, "[p]laintiff filed a motion requesting the court to intervene, but ... no action was taken." Id. at 437. Since this judicial inaction allowed the coerced waiver tactic to work from defendants' perspective, it was of no consolation to plaintiff's counsel that the First Circuit subsequently criticized the defense tactic as contrary to the Fees Act: "for a defendant to require [plaintiff's counsel] to forego his fee ... or to attempt to negotiate an unreasonable fee, by playing upon counsel's

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(1984). Contra, Moore v. National Ass'n of Securities Dealers, 762 F.2d 1093 (D.C. Cir. 1985).

concern for his client, is contrary to the very intendment of the Act." Id. at 438.

The absence of a Prandini rule has led to similar inaction in other cases, thereby allowing defendants to leverage coerced waivers.35/ It also has permitted district

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35. The judicial inaction in these cases is, not surprisingly, ordinarily unreported. Illustrative is Chattanooga Branch, NAACP v. City of Chattanooga, No. 79-2111 (E.D. Tenn. Dec. 2, 1981), appeal dismissed, Nos. 82-5013 & 82-5016 (6th Cir. April 29, 1982), a suit challenging, on racial discrimination grounds, a rezoning that prevented construction of a low-income housing project. Subsequent to extensive discovery and pretrial preparation, plaintiffs were presented with a coerced waiver. The district court refused to enter a formal order on plaintiffs' motion to bar defendants from insisting on a fee waiver in exchange for a settlement offer. (This inaction prevented an interlocutory appeal). Instead, the judge advised counsel orally in an unrecorded chambers conference to negotiate for the clients without regard to any fee interest. The defendants then threatened to withdraw their offer to make a parcel of city-owned land available for construction of the low-income housing. With the ethical dilemma squarely presented, plaintiffs agreed to a fee waiver provision, which the district court subsequently refused to set aside. Plaintiffs then appealed the district court's order refusing to set aside the fee waiver. Defendants cross-appealed conditionally, arguing (as do petitioners here) that if the fee waiver were invalidated the entire consent decree must fall. Defendants then advised plaintiffs' counsel that because of the pending cross-appeals, the city was unable to obtain title insurance for the [footnote cont'd]

court judges on occasion to compel simultaneous negotiation.[36]

2. The widely varying judicial responses to these problems is mirrored by the approaches taken by petitioners and their amici. Several, for example, urge rejection

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parcel, could not close and transfer the property to the developer, and could not assure that the housing project would be built. Again, faced with the imminent danger of losing all relief on the merits, plaintiffs' counsel capitulated and dismissed the appeal. See generally Comment, Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations, 131 U. Pa. L. Rev. 793, 802 (1983); see also, e.g., Levin, Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees Are Authorized, 14 Clearinghouse Review 515, 519 & nn.47 & 48 (1980).

36. Amicus Lawyers' Committee recently represented plaintiffs in an education suit seeking only injunctive relief. When defendants raised the fee question before agreement on the merits had been reached, plaintiffs' counsel suggested there was an ethical problem and that fee discussions should be postponed until after court approval of a merits consent decree. At the next settlement meeting, defense counsel reported that he had had an ex parte conversation with the judge, who advised that he would refuse to consider any proposed consent decree that did not resolve the question of fees along with the merits.

of the Prandini rule against simultaneous negotiation but at the same time suggest that ethical difficulties may be avoided by resort to the district courts pursuant to Fed. R. Civ. P. Rules 16 and 23.[37] On the other hand, the Solicitor General suggests that these rules are inappropriate to the task, U.S. Br. at 28-29, and that trial courts should rarely become involved in disputes over demands for fee waivers, id. at 27. Both petitioners and the Solicitor General suggest the necessity of an initial showing of "bad faith" on the part of defense counsel, Pet. Br. at 36; U.S. Br. at 27;[38] while at the same time petitioners and other amici urge that the ethical obligation to provide

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37. E.g., Br. for Council of State Governments, et al., at 19; Br. for Equal Employment Advisory Council at 7, 18; Pet. Br. at 8.

38. Any such bad faith requirement as a precondition for awarding fees to prevailing plaintiffs is of course completely inconsistent with Newman v. Piggie Park Enterprises, Inc., 390 U.S. at 401-02; see also Hutto v. Finney, 437 U.S. at 693.

zealous representation in fact requires defense counsel nearly always to seek to extinguish the fee liability of the client in any settlement.[39]

3. There is, in fact, no standard practice among the federal trial courts to prevent coerced fee waivers that are contrary to the policy underlying the Fees Act.[40] While the instant case arises in unique cir-

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39. See Pet Br. at 31-35; Br. for Council of State Governments, et al., at 16; Br. for Alabama, et al., at 52-53.

40. The suggestion in Moore, 762 F.2d at 1105 n.17 (opinion of MacKinnon, J.) that the conflict can be avoided by careful drafting of a retainer agreement to vest the right to the fee award in the client is unavailing. If the retainer merely transfers the attorney's interest in a statutory fee recovery to the client, it would lack consideration and, more to the point, would vest in the client a right to recover sums never anticipated which he would be quite likely to abandon in order to protect the merits relief offered. If, on the other hand, the retainer transfers to the client the right to the fee award but also creates an obligation to pay a reasonable fee to the attorney should the merits claim prevail, then either the policy underlying the Fees Act, or the policy encouraging settlements, will be fatally compromised.

cumstances since the parties openly memorialized petitioners' demand for a fee waiver and agreed that the propriety of that demand should be decided by the court, amici submit that this Court should do more than merely affirm the judgment below.

A holding that fee waivers coerced as a condition of merits settlements are unenforceable and contrary to public policy will do much to ameliorate the problem in negotiations between "ethical counsel," White v. New Hampshire Department of Employment Security, 455 U.S. 445, 453 n.15 (1982). More importantly, this Court's announcement of a Prandini-type bar against simultaneous negotiation, or at least against defense initiated fee waivers in the context of merits negotiations, would fulfill Congress' purposes in enacting the Fees Act.41/ It would

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41. Short of drawing a Prandini bright line, the Court at the very least must direct lower federal courts to give special scrutiny to simultaneously [footnote cont'd]

also have the profoundly beneficial effect of encouraging early settlement negotiations. In our experience, separate negotiation of the merits, followed by good faith negotiation of fees, greatly advances the settlement of cases, while also fulfilling Congress' intent.

CONCLUSION

The judgment below should be affirmed. And clear guidance to the lower federal courts should be provided so as to assure, in the words of Congress in the Senate Report at 6, that "our civil rights laws" do not

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negotiated settlements when parties seek court approval of settlements pursuant to Fed. R. Civ. P. Rule 23(e), or entry of consent decrees in individual suits. Further, the Court should instruct the lower courts to take prompt action when the parties seek assistance pursuant to Fed. R. Civ. P. Rule 16 because of conflicts of interest arising in the negotiation process. Such prompt action should include the entry of Lisa F. orders barring simultaneous negotiations of fees and the merits. Responsiveness by the courts to counsel's requests for assistance is, we submit, the minimum judicial action necessary to assure at least a measure of compliance with Congress' purposes in enacting the Fees Act.

"become mere hollow pronouncements which the average citizen cannot enforce."

Respectfully submitted,

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